FCC 96-325

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

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I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996 - A New Direction

1. The Telecommunications Act of 1996[1] fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefitted enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act.

3. Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*to be codified at* 47 U.S.C. §§ 151 *et. seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code.

telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

4. These three goals are integrally related. Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscribership, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a Carrier Common Line charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed.[2] The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example,

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and *Order Establishing Joint Board*, FCC 96-93 (rel. Mar. 8, 1996) (*Universal Service NPRM*).

without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to accomplish the first of the goals outlined above -- opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will make its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counterparts at the state level complete implementing and supplementing these rules will the complete blueprint for competition be in

place. Completion of the trilogy, coupled with the reduction in burdensome and inefficient regulation we have undertaken pursuant to other provisions of the 1996 Act, will unleash marketplace forces that will fuel economic growth. Until then, incumbents and new entrants must undergo a transition process toward fully competitive markets. We will, however, act quickly to complete the three essential rulemakings. We intend to issue a notice of proposed rulemaking in 1996 and to complete the access charge reform proceeding concurrently with the statutory deadline established for the section 254 rulemaking. This timetable will ensure that actions taken by the Joint Board in November and this Commission by not later than May 1997 in the universal service reform proceeding will be coordinated with the access reform docket.

C. Economic Barriers

10. As we pointed out in our Notice of Proposed Rulemaking in this docket[3], the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.[4] Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area,[5] an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

11. Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996), 61 Fed. Reg. 18311 (Apr. 25, 1996) (NPRM).

[4] *See* NPRM at para. 6.

[5] *See* NPRM at n.13.

cost-based prices.[6] Congress also recognized that the transition to competition presents special considerations in markets served by smaller telephone companies, especially in rural areas.[7] We are mindful of these considerations, and know that they will be taken into account by state commissions as well.

12. The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously -- whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

13. We note that an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[8] Sections 251(b)(5) and (c)(2) require incumbent LECs to enter into such agreements on just, reasonable, and nondiscriminatory terms and to transport and terminate traffic originating on another carrier's network under reciprocal compensation arrangements. In this item, we adopt rules for states to apply in implementing these mandates of section 251 in their arbitration of interconnection disputes, as well as their review of such arbitrated arrangements, or a BOC's statement of generally available terms. We believe that our rules will assist the states in carrying out their

[6] *See* NPRM at paras. 10-12.

[7] 47 U.S.C. § 251(f).

[8] *See infra*, Section IV.A.

responsibilities under the 1996 Act, thereby furthering the Act's goals of fostering prompt, efficient, competitive entry.

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service.[9] Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities.

15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory."[10] We adopt rules herein to implement these requirements of section 251(c)(3).

D. Operational Barriers

16. The statute also directs us to remove the existing operational barriers to entering the local market. Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. Our recently-issued number portability Report and Order addressed one of the most significant operational barriers to competition by permitting customers to retain their phone numbers when they change local carriers.[11]

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[9] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121.

[10] *See* 47 U.S.C.§ 251(c)(3)

[11] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-286 (rel. July 2, 1996) (*Number Portability Order*). Consistent with the 1996 Act, 47 U.S.C. §251(b)(2), we required LECs to implement interim and long-term measures to ensure that customers can change their local service providers without having to change their phone number. Number portability promotes competition by making it less expensive and less disruptive for a customer to switch providers, thus freeing the customer to choose the local provider that offers the best value.

17. Closely related to number portability is dialing parity, which we address in a companion order.[12] Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider. The history of competition in the interexchange market illustrates the critical importance of dialing parity to the successful introduction of competition in telecommunications markets. Equal access enabled customers of non-AT&T providers to enjoy the same convenience of dialing "1" plus the called party's number that AT&T customers had. Prior to equal access, subscribers to interexchange carriers (IXCs) other than AT&T often were required to dial more than 20 digits to place an interstate long-distance call. Industry data show that, after equal access was deployed throughout the country, the number of customers using MCI and other long-distance carriers increased significantly.[13] Thus, we believe that equal access had a substantial pro-competitive impact. Dialing parity should have the same effect.

18. This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets. As an example, customers can voluntarily switch from one interexchange carrier to another extremely rapidly, through automated systems. This has been a boon to competition in the interexchange market. We expect that moving customers from one local carrier to another rapidly will be essential to fair local competition.

19. As competition in the local exchange market emerges, operational issues may be among the most difficult for the parties to resolve. Thus, we recognize that, along with the state commissions and the courts, we will be called upon to enforce provisions of arbitrated agreements and our rules relating to these operational barriers to entry. Because of the critical importance of eliminating these barriers to the accomplishment of the Act's pro-competitive objectives, we intend to enforce our rules in a manner that is swift, sure, and effective. To this end we will review, with the states, our enforcement techniques during the fourth quarter of 1996.

20. We recognize that during the transition from monopoly to competition it is vital that we and the states vigilantly and vigorously enforce the rules that we adopt today and that will be adopted in the future to open local markets to competition. If we fail to meet that responsibility, the actions that we take today to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective.

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[12] NPRM paras. 202-219.

[13] Federal Communications Commission, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 1994-95, at 344, Table 8.8; Federal Communications Commission, REPORT ON LONG DISTANCE MARKET SHARE, Second Quarter 1995, at 14, table 6 (Oct. 1995).

E. Transition

21. We consider it vitally important to establish a "pro-competitive, deregulatory national policy framework"[14] for local telephony competition, but we are acutely mindful of existing common carrier arrangements, relationships, and expectations, particularly those that affect incumbent LECs. In light of the timing issues described above, we think it wise to provide some appropriate transitions.

22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets. On those issues where the need to create a factual record distinct to a state or to balance unique local considerations is material, we ask the states to develop their own rules that are consistent with general guidance contained herein. The states will do so in rulemakings and in arbitrating interconnection arrangements. On other issues, particularly those related to pricing, we facilitate the ability of states to adopt immediate, temporary decisions by permitting the states to set proxy prices within a defined range or subject to a ceiling. We believe that some states will find these alternatives useful in light of the strict deadlines of the law. For example, section 252(b)(4)(C) requires a state commission to complete the arbitration of issues that have been referred to it, pursuant to section 252(b)(1), within nine months after the incumbent local exchange carrier received the request for negotiation. Selection of the actual prices within the range or subject to the ceiling will be for the state commission to determine. Some states may use proxies temporarily because they lack the resources necessary to review cost studies in rulemakings or arbitrations. Other states may lack adequate resources to complete such tasks before the expiration of the arbitration deadline. However, we encourage all states to complete the necessary work within the statutory deadline. Our expectation is that the bulk of interconnection arrangements will be concluded through arbitration or agreement, by the beginning of 1997. Not until then will we be able to determine more precisely the impact of this Order on promoting competition. Between now and then, we are eager to continue our work with the states. In this period, as set forth earlier, we should be able to take major steps toward implementing a new universal service system and far-reaching reform of interstate access. These reforms will reflect intensive dialogue between us and the states.

23. Similarly, as states implement the rules that we adopt in this order as well as their own decisions, they may find it useful to consult with us, either formally or informally, regarding particular aspects of these rules. We encourage and invite such inquiries because we believe that such consultations are likely to provide greater certainty to the states as they apply our rules to specific arbitration issues and possibly to reduce the burden of expensive judicial proceedings on states. A variety of formal and informal procedures exist under our rules for such consultations, and we may find it helpful to fashion others as we gain additional experience under the 1996 Act.

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[14] Joint Explanatory Statement at 1.

F. Executive Summary

1. Scope of Authority of the FCC and State Commissions

24. The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build. The Commission also intends to review and amend the rules it adopts in this Report and Order to take into account competitive developments, states' experiences, and technological changes.

2. Duty to Negotiate in Good Faith

25. In the Report and Order, the Commission establishes some national rules regarding the duty to negotiate in good faith, but concludes that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. The Commission also concludes that, in many instances, whether a party has negotiated in good faith will need to be decided on a case-by-case basis, in light of the particular circumstances. The Commission notes that the arbitration process set forth in section 252 provides one remedy for failing to negotiate in good faith. The Commission also concludes that agreements that were negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to section 252(a). If the state commission approves such agreements, the terms of those agreements must be made available to requesting telecommunications carriers in accordance with section 252(i).

3. Interconnection

26. Section 251(c)(2) requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission concludes that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. The Commission identifies a minimum set of five "technically feasible"

points at which incumbent LECs must provide interconnection: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signalling facilities, such as signalling transfer points, necessary to exchange traffic and access call-related databases. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. The Commission finds that telecommunications carriers may request interconnection under section 251(c)(2) to provide telephone exchange or exchange access service, or both. If the request is for such purpose, the incumbent LEC must provide interconnection in accordance with section 251(c)(2) and the Commission's rules thereunder to any telecommunications carrier, including interexchange carriers and commercial mobile radio service (CMRS) providers.

4. Access to Unbundled Elements

27. Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In the Report and Order, the Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. The Commission concludes that incumbent LECs must provide nondiscriminatory access to operations support systems functions by January 1, 1997. The Commission concludes that access to such operations support systems is critical to affording new entrants a meaningful opportunity to compete with incumbent LECs. The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.

5. Methods of Obtaining Interconnection and Access to Unbundled Elements

28. Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. The Commission concludes that incumbent LECs are required to provide for any technically feasible method of interconnection or access requested by a telecommunications carrier, including

physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts, with certain modifications, some of the physical and virtual collocation requirements it adopted earlier in the *Expanded Interconnection* proceeding. The Commission also establishes rules interpreting the requirements of section 251(c)(6).

6. Pricing Methodologies

29. The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission concludes that the state commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission concludes that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies Total Service Long Run Incremental Cost of a particular network element, which the Commission calls "Total Element Long-Run Incremental Cost" (TELRIC), plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. For states that are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission establishes default ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2-0.4 cents per minute for switching. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also establishes default ceilings for the other unbundled network elements.

7. Access Charges for Unbundled Switching

30. Nothing in this Report and Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission's rules, when the incumbent LEC provides exchange access service to an interexchange carrier, either directly or through service resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission continues to provide for a certain portion of access charge recovery with respect to use of an incumbent LEC's unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers pay unbundled network element charges. This aspect of the Order expires at the earliest of: 1) June 30,

1997; 2) the effective date of final decisions by the Commission in the universal service and access reform proceedings; or 3) if the incumbent LEC is a Bell Operating Company (BOC), the date on which that BOC is authorized under section 271 of the Act to provide in-region interLATA service, for any given state.

31. For a similar limited period, incumbent LECs may charge the same portions of any intrastate access charges comparable to the carrier common line charge (CCLC) and the transport interconnection charge (TIC), as well as any existing explicit universal service support mechanisms based on intrastate access charges. During this period, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. These state mechanisms must end on the earlier of: (1) June 30, 1997; (2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; and (3) if the incumbent LEC that receives the access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The last end date will apply only to the recovery of charges in those states in which the BOC is authorized to offer interLATA service.

8. Resale

32. The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. State commissions must identify marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. The Commission identifies certain avoided costs, and the application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17-25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

9. Requesting Telecommunications Carriers

33. The Commission concludes that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services directly to the public or to such classes of users as to be effectively available directly to the public, the carrier is a "telecommunications carrier," and is thus subject to the requirements of section 251(a) and the benefits of section 251(c). The Commission

concludes that CMRS providers are telecommunications carriers, and that private mobile radio service (PMRS) providers generally are not telecommunications carriers, except to the extent that a PMRS provider uses excess capacity to provide local, interexchange, or international services for a fee directly to the public. The Commission also concludes that, if a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier.

10. Commercial Mobile Radio Service

34. The Commission concludes that LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2) to to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks. The Commission concludes that many CMRS providers (specifically cellular, broadband PCS and covered specialized mobile radio (SMR) providers) offer telephone exchange service and exchange access, and that incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252. The Commission concludes that CMRS providers should not be classified as LECs at this time. The Commission also concludes that it may apply section 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with section 201, is a basis for jurisdiction over LEC-CMRS interconnection.

11. Transport and Termination

35. The 1996 Act requires that charges for transport and termination of traffic set based on "additional cost." The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company's forward-looking economic costs. The state commissions would use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range of 0.2-0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the range. In addition, the Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

12. Access to Rights of Way

36. The Commission amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable

television systems and telecommunications carriers to poles, ducts, conduits, and rights-of-way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles, ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

13. Obligations Imposed on non-incumbent LECs

37. The Commission concludes that states generally may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, "Additional Obligations on Incumbent Local Exchange Carriers." Section 251(h)(2) sets forth a process by which the Commission may decide to treat LECs as incumbent LECs, and state commissions or other interested parties may ask the Commission to issue a rule, in accordance with section 251(h)(2), providing for the treatment of a LEC as an incumbent LEC. In addition to this Report and Order, the Commission addresses in separate proceedings some of the obligations, such as dialing parity and number portability, that section 251(b) imposes on all LECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

38. Section 251(f)(1) provides for exemption from the requirements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation's subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c). In the Report and Order, the Commission establishes a very limited set of rules interpreting the requirements of section 251(f). For example, the Commission finds that LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified. Rural LECs bear the burden of proving that continued exemption of the requirements of section 251(c) is justified, once a bona fide request has been made by a carrier under section 251. The Commission also concludes that only LECs that, at the holding company level, have fewer than 2 percent of the nation's subscriber lines are entitled to petition for suspension or modification of requirements under section 251(f)(2). For the most part, however, the states will interpret the provisions of section 251(f) through rulemaking and adjudicative proceedings, and will be responsible for determining whether a LEC in a particular instance is entitled to exemption, suspension, or modification of section 251 requirements.

15. Commission Responsibilities Under Section 252

39. Section 252(e)(5) requires the Commission to assume the state's responsibilities under section 252 if the state "fails to act to carry out its responsibility" under that section. In the Report and

Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, under which each party to the arbitration proposes its best and final offer, and the arbitrator chooses among the proposals. The arbitrator could choose a proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. In addition, the parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision.

40. Section 252(i) of the 1996 Act requires that incumbent LECs make available to any requesting telecommunications carrier any individual interconnection, service, or network element on the same terms and conditions as contained in any agreement approved under Section 252 to which they are a party. The Commission concludes that section 252(i) entitles all carriers with interconnection agreements to "most favored nation" status regardless of whether such a clause is in their agreement. Carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed interconnection agreement without having to agree to the entire agreement. Additionally, carriers seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but instead may obtain access to agreement provisions on an expedited basis.

II. SCOPE OF THE COMMISSION'S RULES

41. In implementing section 251, we conclude that some national rules are necessary to promote Congress's goals for a national policy framework and serve the public interest, and that states should have the major responsibility for prescribing the specific terms and conditions that will lead to competition in local exchange markets. Our approach in this Report and Order has been a pragmatic one, consistent with the Act, with respect to this allocation of responsibilities. We believe that the steps necessary to implement section 251 are not appropriately characterized as a choice between specific national rules on the one hand and substantial state discretion on the other. We adopt national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish. This is consistent with our obligation to "complete all actions necessary to establish regulations to implement the requirements" of section 251.[15] Some of these rules will be relatively self-executing. In many instances, however, the rules we establish call on the states to exercise significant discretion and to make critical decisions through arbitrations and development of state-specific rules. Over time, we will continue to review the allocation of responsibilities, and we will reallocate them if it appears that we have inappropriately or inefficiently designated the decisionmaking roles.

42. The decisions in this Report and Order, and in this Section in particular, benefit from valuable insights provided by states based on their experiences in establishing rules and taking other actions intended to foster local competition. Through formal comments, *ex parte* meetings, and open forums,[16] state commissioners and their staffs provided extensive, detailed information to us regarding difficult or complex issues that they have encountered, and the various approaches they have adopted to address those issues. Information from the states highlighted both differences among communities within states, as well as similarities among states. Recent state rules and orders that take into account the local competition provisions of the 1996 Act have been particularly helpful to our deliberations about the types of national rules that will best further the statute's goal of encouraging local telephone

[15] 47 U.S.C. § 251(d)(1).

[16] Public forum held on March 15, 1996, by FCC's Office of General Counsel to discuss interpretation of sections 251 and 252 of the Telecommunications Act of 1996; public forum held on July 9, 1996, by FCC's Common Carrier Bureau and Office of General Counsel to discuss implementation of section 271 of the Telecommunications Act of 1996.

competition.[17] These state decisions also offered useful insights in determining the extent to which the Commission should set forth uniform national rules, and the extent to which we should ensure that states can impose varying requirements. Our contact with state commissioners and their staffs, as well as recent state actions, make clear that states and the FCC share a common commitment to creating opportunities for efficient new entry into the local telephone market. Our experience in working with state commissions since passage of the 1996 Act confirms that we will achieve that goal most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition policy presents new difficulties and opportunities.

43. We also received helpful advice and assistance from other government agencies, including the National Telecommunications and Information Administration (NTIA), the Department of Justice, and the Department of Defense about how national rules could further the public interest. In addition, comments from industry members and consumer advocacy groups helped us understand better the varying and competing concerns of consumers and different representatives of the telecommunications industry. We benefitted as well by discovering that there are certain matters on which there is substantial agreement about the role the Commission should play in establishing and enforcing provisions of section 251.

A. Advantages and Disadvantages of National Rules

1. Background

44. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, by August 8, 1996), to "establish regulations to implement the requirements of [section 251]."[18] In addition, section 253 requires the Commission to preempt the enforcement of any

[17] *See, e.g.*, Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Condition and the Initial Unbundling of Services, Docket No. 6352-U (Georgia Commission May 29, 1996); AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996); Hawaii Administrative Rules, Ch. 6-80, "Competition in Telecommunications Services," (Hawaii Commission May 17, 1996); Public Utilities Commission of Ohio Case No. 95-845-TP-COI (Local Competition) (Ohio Commission June 12, 1996) and Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996, Case No. 96-463-TP-UNC (Ohio Commission May 30, 1996); Proposed Rules regarding Implementation of §§ 40-15-101 *et seq.* Requirements relating to Interconnection and Unbundling, Docket No. 95R-556T (Colorado Commission April 25, 1996) (one of a series of Orders adopted by the Colorado Commission in response to the local competition provisions of the 1996 Act); Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Decision and Order Rejecting Tariff Revisions, Requiring Refiling, Docket No. UT-950200 (Washington Commission April 1996).

[18] 47 U.S.C. § 251(d)(1). The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement at 1.

state or local statute, regulation, or legal requirement that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[19]

45. In the NPRM, we stated our belief that we should implement Congress's goal of a pro-competitive, de-regulatory, national policy framework by adopting national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states.[20] We sought comment on the extent to which we should adopt explicit national rules, and the extent to which permitting variations among states would further Congress's pro-competitive goals.[21] We anticipated that we would rely on actions some states have already taken to address interconnection and other issues related to opening local markets to competition. In the NPRM, we set forth some of the benefits that would likely result from implementing explicit national rules, and some of the benefits that would likely result from allowing variations among states.[22]

2. Comments

46. The parties recommend a broad spectrum of approaches with respect to the scope and detail of Commission regulations. The vast majority of potential local competitors, such as interexchange carriers (IXCs), competitive access providers (CAPs), and cable operators, assert that the Commission should adopt clear and explicit national standards that will serve as the backdrop for negotiations and will establish minimum requirements for arbitrated agreements.[23] Other parties, including federal agencies, consumer groups, and equipment manufacturers, also support explicit national rules.[24] These parties contend that explicit national standards are useful, or even critical, to achieving the pro-competitive goals enunciated by Congress.

47. Parties supporting explicit national rules assert that national standards will give incumbent LECs an incentive to negotiate if the national rules would subject the incumbents to less advantageous

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[19] 47 U.S.C. § 253(a) and (d).

[20] NPRM at para. 26 (*citing* Joint Explanatory Statement at 1).

[21] NPRM at paras. 27, 35.

[22] NPRM at paras. 30-33.

[23] *See, e.g.*, AT&T comments at 3; MCI comments at 4-6; Sprint comments at 4-6; MFS comments at 5-6; Jones Intercable comments at 11, 13; Cable & Wireless comments at 6-7; LCI comments at 2, 13; TCC comments at 5-6; Hyperion comments at 6; Ad Hoc Telecommunications Users Committee comments at 3-10; LDDS reply at 4.

[24] *See, e.g.*, SBA comments at 4; Ohio Consumers' Counsel comments at 2-3; DoJ comments at 5-8; Lucent comments at 3; Frontier reply at 7; IDCMA reply at 2-9; NTIA reply at 3; National Association of the Deaf reply at 1-3; Texas Public Utility Counsel reply at 2.

terms than they otherwise would be likely to negotiate.[25] Other advantages of national standards, according to these parties, include: reducing the likelihood of potentially inconsistent determinations by state commissions and courts,[26] and reducing burdens on new entrants that seek to provide service on a regional or national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability.[27] As a result, they assert, new entrants would have greater access to capital necessary to develop competing services.[28] Parties state that collectively, these advantages demonstrate that national standards will foster competition more quickly than regulations developed on a state-by-state basis.[29] In addition, some parties contend that clear national standards also will assist both the states in arbitrating and reviewing agreements within the time frames set forth in section 252 and the FCC in arbitrating agreements under section 252(e)(5) where states have failed to act, and in reviewing BOC applications to enter in-region interLATA markets pursuant to section 271.[30] Some parties that favor strong national rules caution against prematurely dismantling consumer

[25] *See, e.g.*, AT&T comments at 6-8 (noting that this is particularly true for non-BOC incumbent LECs, such as SNET and GTE, which already have interLATA authority and have no reason to comply with section 251); Cable & Wireless comments at 7-9; Hyperion comments at 7; MFS comments at 5-6; Teleport comments at 14-17 (vague standards will allow incumbents to adopt a "take it or leave it" approach); TCC comments at 5-7; Comcast reply at 5; CompTel reply at 7; LDDS reply at 3-4; NTIA reply at 3; PageNet reply at 4; *see also* Citizens Utilities comments at 5 (FCC should establish minimum standards sufficient to equalize bargaining power between incumbents and new entrants); Cox comments at 10; Excel comments at 2-3. *But see, e.g.*, Ameritech comments at 7-9 (incumbent LECs do not have vastly superior bargaining power, and cannot unilaterally impose terms upon other parties); PacTel comments at 6; USTA comments at 6 n.9 (the NPRM overstates the bargaining power of incumbent LECs; in particular, non-BOC LECs may have less bargaining power than IXCs, cable companies, or competitive access providers); USTA reply at 2-4; Bell Atlantic reply at 3.

[26] ALTS comments at 2-4; ACSI comments at 4; AT&T comments at 9-10; Cox comments at 22-23; DoJ comments at 12; Frontier comments at 6; GSA/DoD comments at 4-5; TIA comments at 5; MCI comments at 4-6 (differing rules will make it difficult to develop a rational national policy); TCC comments at 7-8, 13 (federal rules will eliminate the need for new entrants to expend resources fighting the same battle in 50 states); *accord* Cable & Wireless comments at 10 (even 50 excellent plans are not optimal if they are 50 different plans).

[27] AT&T comments at 9; Cable & Wireless comments at 6-9 (cost efficiencies of national networks are substantial); Excel comments at 2; Hyperion comments at 5; GST comments at 2; Jones Intercable comments at 11; Ohio Consumers' Counsel comments at 3; SBA comments at 4 (national rules will particularly help small competitors); Sprint comments at 3; TCC comments at 7-8; ACSI reply at 4; *see also* Intermedia comments at 3 (national uniform standards are necessary to resolve the many regulatory, technical and operational questions that accompany interconnection to incumbent LEC networks); Lucent comments at 3 (national standards will promote industry growth and assist telecommunications equipment vendors); SDN Users Association comments at 2; International Communications Ass'n comments at 3.

[28] ALTS comments at 2-4; GSA/DoD comments at 4-5; MCI comments at 4-6. *But see* GTE reply at 6 (uniform federal rules will not affect the ability of large, financially well-positioned entities like AT&T to obtain capital).

[29] *See, e.g.*, ALTS comments at 2-4; Competition Policy Institute comments at 10; DoJ comments at 13-15 (a single set of rules can be created faster than 50 different sets).

[30] Ad Hoc Telecommunications Users Committee comments at 9-10; AT&T comments at 8-9, 11; Cable & Wireless comments at 7-9; CompTel comments at 22; Excel comments at 2.

protection rules and relying instead on competitive market conditions that do not yet exist.[31] Many commercial mobile radio service (CMRS) providers contend that national rules governing LEC-CMRS interconnection are necessary to foster development of a ubiquitous, nationwide network.[32]

48. Some state regulatory commissions advocate explicit national standards, at least in some areas. For example, the Massachusetts Commission states that the FCC can and should establish national rules in implementing section 251, except in the area of pricing.[33] The Kentucky Commission asserts that uniform national rules for market entry are necessary to ensure successful local competition, and that national pricing principles will aid states in setting rates during the arbitration process and in reviewing BOC statements of generally available terms.[34] The North Dakota Commission asserts that, while some states may not need federal support, specific standards would provide a necessary and significant benefit for North Dakota, in light of its limited resources to implement a pro-competitive regulatory regime.[35] The Illinois Commission states that minimum national rules are a major step toward competitive markets, but that states should be permitted to implement and enforce additional rules.[36]

49. Some parties contend that national rules are particularly important for small competitors' entry into local markets.[37] Barriers to market entry, which cause delay, raise transactional costs, or otherwise impose economically inefficient constraints, are particularly threatening to small competitors, according to the Small Business Administration. Moreover, the Small Business Administration

[31] *See, e.g.*, Competition Policy Institute reply at 2, 11.

[32] *See, e.g.*, Vanguard comments in CC Docket No. 95-185 at 26; Centennial comments in CC Docket No. 95-185 at 31.

[33] Mass. Commission comments at 4-5. What, if any, rules the Commission should, as both a legal and policy matter, adopt with respect to pricing is addressed separately in *infra*, Section II.D.

[34] Kentucky Commission comments at 3-4. Section 252(f) permits a BOC to file for review by a state commission a statement of terms and conditions that the BOC offers to comply with the regulations of section 251 and the regulations thereunder. A BOC may be permitted to provide in-region interLATA service if, ten months after enactment of the 1996 Act, no carrier has requested access and interconnection (as described in section 271(c)(1)(A)) and the BOC has a statement of generally available terms and conditions that a state commission has approved or permitted to take effect. *See also* Kansas Commission comments at 4-5 (national interconnection standards to enable inter-company provisioning and national performance standards will facilitate negotiations and reduce the incumbent's negotiating advantage).

[35] North Dakota Commission comments at 1-2; *see also* Illinois Commission comments at 9-10 (minimum federal standards will give direction to states, will help create consistency among states, and will serve as a major step in the transition toward a competitive market, but states should be able to augment and build upon national standards).

[36] Illinois Commission comments at 9-10.

[37] *See, e.g.*, SBA comments at 3-4.

contends that the needs of small competitors deserve special consideration, because they are likely to fill niche market needs that larger competitors typically overlook.[38]

50. Other commenters oppose explicit national rules, or seek significant limits on the scope and detail of FCC requirements. The majority of state commissions and incumbent LECs advocate that the Commission establish general, broad regulations or guidelines, and leave substantial opportunity for the parties to negotiate specific terms,[39] with the states to establish specific requirements if the parties cannot reach agreement.[40] BellSouth urges the Commission merely to codify the language of the 1996 Act.[41]

51. Parties that oppose explicit national standards assert that they are contrary to the Act,[42] could impede the development of local competition,[43] and will undermine progressive actions already taken by states.[44] They also assert that states should be given the opportunity to experiment with different approaches intended to promote local competition,[45] and that technical, economic, geographic,

[38] *Id; accord, e.g.*, Richard N. Koch comments at 1-2; ATSI reply at 7-8.*Contra, e.g.*, Colorado Ind. Tel. Ass'n comments at 2-3; GVNW comments at 2; NARUC comments at 8; Joint Consumer Advocates reply at 5-6 (national standards will be particularly burdensome for small or rural LECs, and will make it difficult for "niche" providers to succeed); Rural Tel. Coalition comments at 4-8.

[39] Ameritech comments at 6; Bell Atlantic comments at 2-3; Georgia Commission comments at 3-5; Illinois Commission comments at 13; Lincoln Tel. comments at 3-4; Rural Tel. Coalition comments at 2; South Carolina Commission comments at 2-3; SBC comments at 4-5, 19-21; TDS comments at 3 (Congress evinced a preference for voluntarily negotiated agreements and the FCC should not try to alter the Act's mechanisms for transitioning to competition); USTA comments at 6; Ohio Consumers' Counsel reply at 3.

[40] *See, e.g.*, USTA comments at 6-8; Alabama Commission comments at 10; Ameritech comments at 4, 6; Bell Atlantic comments at 1-2; Iowa Commission comments at 2, 4; NARUC comments at 4, 22-24; Idaho Commission comments at 2-4; North Carolina Commission Staff comments at 10-11; Oklahoma Commission comments at 1-3; Puerto Rico Tel. comments at 3-4;*accord* Alliance for Public Technology comments at 8-10; CFA/CU comments at 4-5; Rural Tel. Coalition comments at 2, 6; TDS comments at 3; Texas Commission comments at 4-5.

[41] BellSouth comments at 3-5.

[42] Alaska Tel. Ass'n comments at 2; Ameritech comments at 9; Bell Atlantic comments at 2-3; GTE comments at 12-14; Puerto Rico Tel. comments at 2-3; Rural Tel. Coalition comments at 2, 6; SBC comments at 8-10, 18-19.

[43] Ad Hoc Coalition of Corporate Telecommunications Managers comments at 2; BellSouth comments at 3-5; District of Columbia Commission comments at 11-12; Georgia Commission comments at 2; Maryland Commission comments at 2-3; Oregon Commission comments at 7, 25; PacTel comments at 1-3; California Commission reply at 8; *see also* Illinois Commission comments at 9-10 (overly extensive federal regulation could inhibit competition by restricting a state's ability to respond to technological and market developments and regional differences).

[44] Connecticut Commission comments at 8-9; GTE comments at 10; Maryland Commission comments at 5-6, 12; MECA comments at 11-12; Municipal Utilities comments at 6-8; North Carolina Commission Staff comments at 9-10; Oregon Commission comments at iv, 7; PacTel comments at 1-3; Washington Commission comments at 1-2.

[45] *See, e.g.*, Alliance for Public Technology comments at 8-10; Florida Commission comments at 2-3, 6; New York Commission comments at 18-19; Pennsylvania Commission comments at 17; TDS comments at 11.

and demographic variations require tailored responses by state commissions.[46] For example, GTE states that, "[i]n reality, each local market is different -- some are flat, others are hilly or mountainous; some are densely populated, others are suburban or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a high proportion of business customers, others are predominantly residential."[47] Many parties counter that geographic differences do not merit state-specific rules instead of national rules.[48] They contend that the differences cited by GTE exist among different locales, but that many states include most of these variations within their borders.[49]

52. State commissions and incumbent LECs reject the suggestion that the FCC is required to impose nationally uniform requirements in order to achieve Congress's goals. For example, in support of its claim that Congress did not intend national uniformity, the New York Commission cites the fact that agreements may be negotiated without reference to the Commission's regulations under section 251(b) and (c), and that under section 251(d)(3), states may impose rules consistent with the Act.[50]

3. Discussion

53. Comments and *ex parte* discussions with state commission representatives have convinced us that we share with states a common goal of promoting competition in local exchange markets. We conclude that states and the FCC can craft a working relationship that is built on mutual commitment to local service competition throughout the country, in which the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition. In implementing the national rules we adopt in this Report and Order, states will help to illuminate and develop innovative solutions regarding many complex issues for which we have not attempted to prescribe national rules at this time, and states will adopt specific rules that take into account local concerns. In this Report and Order, and in subsequent actions we intend to

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[46] *See, e.g.*, District of Columbia Commission comments at 7; North Carolina Commission comments at 2-8; Wyoming Commission comments at 4-5 (Wyoming is rural and sparsely populated, and has among the highest costs in the country, but residents in both cities and rural areas require access to sophisticated services; it cannot "afford to be subjected needlessly to the problems which models designed to address other people's problems would cause").

[47] GTE comments at 7-8.

[48] ALTS comments at 4 (aside from universal service issues that are being addressed by a Joint Board in a separate proceeding, there are no unique policy concerns that states need to address or that would be endangered by national rules); Cable & Wireless comments at 9; DoJ comments at 13-15; GCI comments at 4; MCI comments at 4-6 (networks are not designed on a state-specific basis); Jones Intercable comments at 12; Cox reply at 4 n.8.

[49] *See, e.g.*, AT&T comments at 12.

[50] New York Commission comments at 12-13; *see also* Maryland Commission comments at 9, 13, 20; Washington Commission comments at 7-8 (referencing section 252(e)(3)); Rural Tel. Coalition reply at 6.

take, we have and will continue to seek guidance from various states that have taken the lead in establishing pro-competitive requirements.[51] Virtually every decision in this Report and Order borrows from decisions reached at the state level, and we expect this close association with and reliance on the states to continue in the future. We therefore encourage states to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a number of policies consistent with the 1996 Act are generated by states.

54. We find that certain national rules are consistent with the terms and the goals of the statute. Section 251 sets forth a number of rights with respect to interconnection, resale services, and unbundled network elements. We conclude that the Commission should define at least certain minimum obligations that section 251 requires, respectively, of all telecommunications carriers, LECs, or incumbent LECs. For example, as discussed in more detail below, we conclude that it is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers pursuant to the standards set forth in sections 251(c) and (d), while also permitting states to go beyond that minimum list and impose additional requirements that are consistent with the 1996 Act and the FCC's implementing rules. We find no basis for permitting an incumbent LEC in some states not to make available these minimum technically feasible network elements that are provided by incumbent LECs in other states. We point out, however, that a uniform rule does not necessarily mean uniform results. For example, a national pricing methodology takes into account local factors and inputs, and thus may lead to different prices in different states, and different regions within states. In addition, parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt.[52] We intend to review on an ongoing basis the rules we adopt herein in light of competitive developments, states' experiences, and technological changes.

55. We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and

[51] We also expect to rely heavily on state input and experience in other FCC proceedings, such as access reform and petitions concerning BOC entry into in-region interLATA markets.

[52] 47 U.S.C. § 252(a)(1).

nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets. National (as opposed to state) rules more directly address these competitive circumstances.

56. We emphasize that, under the statute, parties may voluntarily negotiate agreements "without regard to" the rules that we establish under sections 251(b) and (c).[53] However, fair negotiations will be expedited by the promulgation of national rules. Similarly, state arbitration of interconnection agreements now and in the future will be expedited and simplified by a clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms. Such efficiency and predictability should facilitate entry decisions, and in turn enhance opportunities for local exchange competition. In addition, for new entrants seeking to provide service on a national or regional basis, minimum national requirements may reduce the need for designing costly multiple network configurations and marketing strategies, and allow more efficient competition. More efficient competition will, in turn, benefit consumers. Further, national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.

57. We also believe that some explicit national standards will be helpful in enabling the Commission and the states to carry out other responsibilities under the 1996 Act. For example, national standards will enable the Commission to address issues swiftly if the Commission is obligated to assume section 252 responsibilities because a state commission has failed to act.[54] In addition, BOCs that seek to offer long distance service in their service areas must satisfy, *inter alia*, a "competitive checklist" set forth in section 271(c)(2)(B). Many of the competitive checklist provisions require compliance with specific provisions of section 251. For example, the checklist requires BOCs to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[55] Some national rules also will help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of section 271(c)(2)(B), the competitive checklist. In addition, national rules that establish the minimum requirements of section 251 will provide states with a consistent standard against which to conduct the fact-intensive process of verifying checklist compliance, the DOJ will have standards against which to evaluate the applications, and we will have standards to apply in adjudicating section 271 petitions in an extremely compressed time frame.

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[53] 47 U.S.C. § 252(a)(1).

[54] *See* 47 U.S.C. § 252(e)(5).

[55] 47 U.S.C. § 271(c)(2)(B)(ii).

Moreover, we believe that establishing minimum requirements that arbitrated agreements must satisfy will assist states in arbitrating and reviewing agreements under section 252, particularly in light of the relatively short time frames for such state action. While some states reject the idea that national rules will help the state commissions to satisfy their obligations under section 252 to mediate, arbitrate, and review agreements, other states have welcomed national rules, at least with respect to certain matters.[56]

58. A broad range of parties urge the Commission to adopt minimum requirements that would permit states to impose additional, pro-competitive requirements that are consistent with the 1996 Act to address local or state-specific circumstances. We agree generally that many of the rules we adopt should establish non-exhaustive requirements, and that states may impose additional pro-competitive requirements that are consistent with the purposes and terms of the 1996 Act, including our regulations established pursuant to section 251.[57] We also anticipate that the rules we adopt regarding interconnection, services, and access to unbundled elements will evolve to accommodate developments in technology and competitive circumstances, and that we will continue to draw on state experience in applying our rules and in addressing new or additional issues. We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We cannot anticipate all of the changes that will occur as a result of technological advancements, competitive developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable. Moreover, we conclude that arbitrated agreements must permit parties to incorporate changes to our national rules, or to applicable state rules as such changes may be effective, without abrogating the entire contract. This will ensure that parties, regardless of when they enter into arbitrated agreements, will be able to take advantage of all applicable Commission and state rules as they evolve.

59. Some parties contend that even minimum requirements may impede the ability of state commissions to take varying approaches to address particular circumstances or conditions. We agree with the contention that, although there are different market conditions from one area to another, such distinct areas do not necessarily replicate state boundaries.[58] For example, virtually all states include

[56] For example, the Georgia and Colorado Commissions support national technical standards for interconnection and collocation, although they generally disfavor detailed standards. Georgia Commission comments at 2; Colorado Commission comments at 2-4. The Illinois Commission, which has aggressively sought to open opportunities for local telephone competition, asserts that minimum national rules are important in developing competitive local telephone service, although it urges the Commission to permit states to implement and enforce additional rules that are consistent with the national rules. Illinois Commission comments at 9-10. The North Dakota Commission has expressed a need for specific national guidance to enable the commission to carry out its obligations under the Act. North Dakota Commission comments at 1-2.

[57] In contrast, we conclude that the 1996 Act limits the obligations states may impose on non-incumbent carriers. *See infra*, Section XI.C.

[58] AT&T comments at 12.

both more densely-populated areas and sparsely populated rural areas, and all include both business and residential areas. Although each state is unique in many respects, demographic and other differences among states do not suggest that national rules are inappropriate. Moreover, even though it may not be appropriate to impose identical requirements on carriers with different network technologies, our rules are intended to accommodate such differences.[59] Some parties have argued that explicit national standards will delay the emergence of local telephone competition, but none has offered persuasive evidence to substantiate that claim, and new entrants overwhelmingly favor strong national rules. We conclude, for the reasons set forth above, that some national rules will enhance opportunities for local competition, and we have chosen to adopt national rules where necessary to establish the minimum requirements for a nationwide pro-competitive policy framework.

60. We disagree with those parties that claim we are trying to impose a uniformity that Congress did not intend. Variations among interconnection agreements will exist, because parties may negotiate their own terms, states may impose additional requirements that differ from state to state, and some terms are beyond the scope of this Report and Order. We conclude, however, that establishing certain rights that are available, through arbitration, to all requesting carriers, will help advise parties of their minimum rights and obligations, and will help speed the negotiation process. In effect, the Commission's rules will provide a national baseline for terms and conditions for all arbitrated agreements. Our rules also may tend to serve as a useful guide for negotiations by setting forth minimum requirements that will apply to parties if they are unable to reach agreement. This is consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251.

61. We also believe that national rules will assist smaller carriers that seek to provide competitive local service. As noted above, national rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state.[60] We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities.[61] In

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[59] *See infra*, Section IV.E.(concluding that successful interconnection or access to an unbundled element at a particular point in the network creates a rebuttable presumption that such interconnection or access is technically feasible at networks that employ *substantially similar facilities*). We agree with parties, such as the Ohio Consumers' Counsel, that physical networks are not designed on a state-by-state basis. Ohio Consumers' Counsel comments at 4.

[60] Approximately 17 Personal Communications Service (PCS) providers have Basic Service Areas/Metropolitan Statistical Areas, for example, that cross state lines.

[61] SBA comments at 3-4.

addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets. We reject the position advocated by some parties that we should not adopt national rules because such rules will be particularly burdensome for small or rural incumbent LECs.[62] We note, however, that section 251(f) provides relief from some of our rules.

62. We recognize the concern of many state commissions that the Commission not undermine or reverse existing state efforts to foster local competition. We believe that Congress did not intend for us needlessly to disrupt the pro-competitive actions some states already have taken that are both consistent with the 1996 Act and our rules implementing section 251.[63] We believe our rules will in many cases be consistent with pro-competitive actions already taken by states, and in fact, many of the rules we adopt are based directly on existing state commission actions. We also intend to continue to reflect states' experiences as we revise our rules. We also recognize, however, that in at least some instances existing state requirements will not be consistent with the statute and our implementing rules.[64] It will be necessary in those instances for the subject states to amend their rules and alter their decisions to conform to our rules. In our judgment, national rules are highly desirable to achieve Congress's goal of a pro-competitive national policy framework for the telecommunications industry.

B. Suggested Approaches for FCC Rules

1. Comments

63. Parties propose a variety of approaches that the Commission could take in establishing rules for interconnection, network unbundling, and other issues addressed in section 251.[65] Many parties suggest that the Commission can, and should, establish regulations within six months of the date of enactment of the 1996 Act, and continue on an ongoing basis to revise and amend rules regarding interconnection, service, and access to unbundled network elements.[66] Parties have differing views

[62] *See, e.g.,* Joint Consumer Advocates reply at 5-6.

[63] 47 U.S.C. § 251(d)(3).

[64] *See infra,* Section II.C.

[65] *See, e.g.*, Cox comments at 22-23; Illinois Commission comments at 9-10; MCI comments at 12; MFS comments at 5-6; SBA comments at 5; Attorneys General reply at 3; California Commission reply at 10-11; Minnesota Ind. Coalition reply at 3-4; National Association of the Deaf reply at 1-3.

[66] MCI reply at 5; Sprint reply at 11.

about why Congress imposed relatively short time frames for action by states and the FCC.[67] Some parties suggest that the Commission take a largely "hands off" approach initially, but that it set more specific rules if and when such rules are needed.[68] IXCs, state commissions, incumbent LECs and others agree that, in setting national rules, the Commission should learn from and build upon the experiences of the states.[69]

64. Some state commissions and incumbent LECs recommend that the FCC establish general, broad principles rather than detailed requirements.[70] Several parties favor a "preferred outcomes" approach similar to the one adopted in California.[71] Under that approach, the FCC would establish acceptable or "preferred" outcomes, but parties would have the opportunity to justify deviation from those outcomes.[72] The California Commission argues that we should establish a range of guidelines that are detailed enough to be easy to implement by states that have not yet developed rules for competition, but flexible enough to allow states to continue their pro-competitive efforts without disruption.[73] At least one party, however, asserts that a "preferred outcomes" approach is not sufficient to provide incumbent LECs with an incentive to bargain in good faith.[74]

65. Some state commissions recommend that, if the FCC does establish explicit requirements, states should be allowed to impose different requirements. For example, the Illinois Commission urges the FCC to adopt a process by which states may seek a waiver from the national regulations, upon a

[67] *See, e.g.*, DoJ comments at 13-15 (the short time frame in which to establish rules evidences Congress's desire to bring about change quickly, which could only occur through a single set of rules, rather than through many iterations); *contra, e.g.*, SBC comments at 10 (the short time frames for seeking arbitration and for state commission review of agreements reflect Congress's desire to bring about change more quickly than the pace that the regulatory process historically has achieved).

[68] Alliance for Public Technology comments at 8-10; U S West comments at 3-4, Illinois Commission comments at 9-10.

[69] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 11-13; MCI comments at 12; Sprint comments at 6-7.

[70] Citizens Utilities comments at 3; Guam Telephone Authority comments at 5; Lincoln Tel. comments at 1, 3; District of Columbia Commission comments at 11-12.

[71] *See, e.g.*, GTE comments at 12-14; PacTel comments at 1-3; Washington Commission comments at 1-2; ALTS comments at 2-4; Teleport comments at 14-17; Texas Public Utility Counsel reply at 2; Minnesota Ind. Coalition reply at 8.

[72] ALTS comments at 2-4.

[73] California Commission reply at 4-7.

[74] Comcast reply at 5.

showing of need.[75] The Ohio and Florida Commissions recommend that the FCC adopt explicit requirements that states could choose to adopt, but that states would have the option of developing their own requirements.[76] Under the proposal recommended by the Ohio Commission, existing state regulations that are consistent with the 1996 Act would be "grandfathered."[77] In addition, if a state failed to adopt any rules regarding competitive entry into local markets within a specified time, the FCC rules would be binding.[78]

2. Discussion

66. We intend to adopt minimum requirements in this proceeding; states may impose additional pro-competitive requirements that are consistent with the Act and our rules. We decline to adopt a "preferred outcomes" approach, because such an approach would fail to establish explicit national standards for arbitration, and would fail to provide sufficient guidance to the parties' options in negotiations. To the extent that parties advocate "preferred outcomes" from which the parties could deviate in arbitrated agreements, we reject such a proposal, because we conclude that it would not provide the benefits conferred by establishing "default" requirements. To the extent that commenters advocate a regulatory approach that would require parties to justify a negotiated result different from the preferred outcomes, we believe that such an approach would impose greater constraints on voluntarily negotiated agreements than the 1996 Act permits. Under the 1996 Act, parties may freely negotiate any terms without justifing deviation from "preferred outcomes."[79] The only restriction on such negotiated agreements is that they must be deemed by the state commission to be nondiscriminatory and consistent with the public interest, under the standards set forth in section 252(e)(2)(A). In response to the Illinois Commission's suggestion that we adopt a process by which states may seek waivers of our rules, we note that Commission rules already provide for waiver of our rules under certain circumstances.[80] We decline to adopt a special waiver process in this proceeding.

67. We intend our rules to give guidance to the parties regarding their rights and obligations under section 251. The specificity of our rules varies with respect to different issues; in some cases, we

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[75] Illinois Commission comments at 13; *accord* AT&T comments at 11; ACTA comments at 2-4.

[76] Florida Commission comments at 2-3; Ohio Commission comments at 4-5; *accord* NYNEX reply at 4.

[77] Ohio Commission comments at 4-5; *accord* NARUC comments at 6-7.

[78] Ohio Commission comments at 4-5.

[79] 47 U.S.C. § 252(a) (parties may negotiate and enter into a binding agreement without regard to standards set forth in sections 251(b) and (c)).

[80] 47 C.F.R. § 1.3.

identify broad principles and leave to the states the determination of what specific requirements are necessary to satisfy those principles. In other cases, we find that local telephone competition will be better served by establishing specific requirements. In each of the sections below, we discuss the basis for adopting particular national principles or rules.

68. We also believe that we should periodically review and amend our rules to take into account experiences of carriers and states, technological changes, and market developments. The actions we take here are fully responsive to Congress's mandate that we complete all actions necessary to establish regulations to implement the requirements of section 251 by August 8, 1996.[81] We nevertheless retain authority to refine or augment our rules, or to follow a different course, after developing some practical experience with the rules adopted herein. It is beyond doubt that the Commission has ongoing rulemaking authority. For example, section 4(i) provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions."[82] Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch and to the ends of justice."[83] We agree with Sprint, the Illinois Commission, and other parties that we should address in this rulemaking the most important issues, and continue to refine our rules on an ongoing basis to address additional or unanticipated issues, and especially to learn from the decisions and experiences of the states.[84] We also reject the argument of Margaretville Telephone Company that the 1996 Act constitutes an unconstitutional taking because it seeks to deprive incumbent LECs of their "reasonable, investment-backed expectation to hold competitive advantages over new market entrants."[85]

C. Legal Authority of the Commission to Establish Rules Applicable to Intrastate Aspects of Interconnection, Services, and Unbundled Network Elements

1. Background

[81] 47 U.S.C. § 251(d)(1).

[82] 47 U.S.C. § 154(i).

[83] 47 U.S.C. § 154(j). Section 11 of the 1996 Act also directs the Commission to review and modify its rules on an ongoing basis. 47 U.S.C. § 161.

[84] Sprint comments at vi, 6-7; Illinois Commission comments at 9-10. Although various parties have encouraged us to address issues that are beyond those identified in the NPRM, we will address only those topics identified in the NPRM, or that are a clear and logical outgrowth from issues specifically identified in the NPRM. *See, e.g.*, Unicom comments at 1-2 (urging the Commission to extend to IXCs the rules it adopts for LECs regarding collocation, interconnection, and unbundling); TCI comments at 15-17 (asking Commission to clarify the extent to which municipalities have control over rights-of-way under section 253).

[85] Margaretville Tel. comments at 1-4.

69. In the NPRM, we tentatively concluded that Congress intended sections 251 and 252 to apply, and that our rules should apply, to both interstate and intrastate aspects of interconnection, services, and access to network elements.[86] We stated in the NPRM that it would seem to make little sense, in terms of economics or technology, to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[87] We also believed that such a distinction would appear to be inconsistent with Congress's desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. We sought comment on these tentative conclusions.

70. We further tentatively concluded in the NPRM that section 2(b) of the 1934 Act does not require a contrary conclusion.[88] Section 2(b) states that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[89] We noted in the NPRM that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions.[90] For example, rates charged to end users for local exchange service have traditionally been subject to state authority, and will continue to be.

2. Comments

71. The parties disagree about the extent to which the FCC has authority to establish regulations pursuant to sections 251 and 252. A majority of commenters that address the issue contend that sections 251 and 252 apply to both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements.[91] Other commenters contend, however, that sections 251 and 252 apply only to intrastate aspects of interconnection, services, and access to unbundled network

[86] NPRM at para. 37.

[87] NPRM at para. 37.

[88] NPRM at para. 39.

[89] 47 U.S.C. § 152(b).

[90] NPRM at para. 40.

[91] *See, e.g.*, ACTA comments at 4; ALTS comments at 6; ACSI comments at 5; Arch comments at 5; Bell Atlantic comments at 7-8 (section 251 addresses matters of a "predominantly intrastate nature"); BellSouth comments at 8; Cable & Wireless comments at 11; CompTel comments at 15; Florida Commission comments at 7; GCI comments at 4; GSA/DoD comments at 6; GTE comments at 3; Jones Intercable comments at 10; MCI comments at 7-8; Sprint comments at 7; TCI comments at 12; Texas Commission comments at 5; NTIA reply at 6 n.15; NCTA reply at 2-7.

elements.[92] None of the commenters appears to claim that section 251 addresses exclusively interstate matters. As discussed below, many parties, including BOCs and state commissions, contend that the FCC's role under sections 251 and 252 is quite limited.[93]

72. The IXCs and other potential competitors in local exchange markets generally assert that the 1996 Act expressly authorizes, and even obligates, the Commission to establish regulations regarding interstate and intrastate aspects of interconnection, service, and access to unbundled network elements. For example, MCI contends that, "[b]ecause the technical feasibility and cost of providing a particular arrangement do not depend on whether the requesting carrier uses that arrangement to provide interstate or intrastate services," it would make no sense to interpret section 251 to include a jurisdictional distinction between interstate and intrastate aspects of interconnection that does not appear on the face of that provision.[94] Several parties assert that sections 251 and 252 alter traditional jurisdictional boundaries by giving states some authority over interstate matters that they previously did not have, and by giving the FCC some new authority over intrastate matters.[95] Other parties assert that section 251 clearly applies to intrastate aspects of interconnection, services, and access to unbundled elements, and that, as a basic principle of administrative law, to the extent that section 251 addresses intrastate matters, the FCC has authority to adopt implementing regulations.[96]

73. Parties point to other provisions in the 1996 Act to show that the traditional jurisdictional division of authority between states and the FCC does not apply with respect to sections 251 and 252. MCI contends that section 253, by addressing federal preemption of both interstate and intrastate barriers to competition, makes it clear that the jurisdictional division of responsibility is inapplicable.[97] Parties also point to the fact that the Commission must in some circumstances assume the state commission's responsibilities as evidence of a shift in jurisdictional authority.[98] Jones Intercable asserts that sections 251 and 252 of the 1996 Act make distinctions among classes of entities

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[92] NARUC comments at 9-10; New York Commission comments at 10-11; U S West comments at 10-11.

[93] Bell Atlantic comments at 7-8; GTE comments at 3; PacTel comments at 11.

[94] MCI comments at 7, 8 (it is highly unlikely that interconnection arrangements will be used exclusively for jurisdictional-specific traffic).

[95] Illinois Commission comments at 3-5, 15; Sprint comments at 5; CompTel reply at 5; Rural Tel. Coalition reply at 3.

[96] MCI reply at 36-37; Vanguard reply at 4 (*citing Time Warner v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995) for the proposition that agencies are empowered to interpret their organic statutes, through rules and other mechanisms, to govern the behavior of parties regulated under those statutes).

[97] MCI comments at 7-8; *accord* Sprint comments at 4; CompTel comments at 15; TCI reply at 6.

[98] *See, e.g.*, ACTA comments at 4; New Jersey Cable Ass'n, *et al.* reply at 18-19; TCI reply at 6.

(telecommunications carriers, LECs, and incumbent LECs), rather than between interstate and intrastate service.[99]

74. AT&T contends that, by requiring the Commission to "complete all actions necessary to establish regulations to implement the requirements of this Section," section 251(d)(1) requires the Commission to establish minimum national standards for interconnection, unbundling, pricing, resale, and related requirements.[100] AT&T states that the 1996 Act was created pursuant to the settled rule that federal agency regulations preempt any inconsistent state policies unless the underlying federal statute otherwise provides.[101] It interprets section 251(d)(3) to mean that any Commission regulation that reasonably implements section 251 bars state enforcement of any inconsistent state regulations, without regard to whether the preemptive provisions of section 253 would also apply. According to AT&T, the only limitation on the Commission's preemptive powers is that it may not preclude the enforcement of state access and interconnection requirements that are consistent with the 1996 Act and the FCC's implementing regulations.[102] AT&T maintains that this interpretation is consistent with the fact that section 252(c)(1) requires state commissions to ensure that nonvoluntary agreements are consistent with the Commission's regulations under section 251(d).[103]

75. AT&T further contends that section 2(b) of the Act does not limit the Commission's authority to promulgate rules under section 251, because section 251 "gives the FCC explicit authority to prescribe and enforce preemptive rules that are necessary to achieve the Act's purpose of developing local services competition."[104] Sprint, Comcast, and other parties assert that Congress intended section 251 to give the Commission authority over both interstate and intrastate aspects of

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[99] Jones Intercable comments at 10; *see also* Time Warner comments at 7; Cable & Wireless comments at 11-12 (sections 251 and 252 apply to *all* telecommunications services, and the definitions of "telecommunications," "telecommunications service," and "telecommunications carrier" are defined without reference to jurisdictional boundaries); New Jersey Cable Ass'n *et al.* reply at 18-19; GSA/DoD reply at 7 (Congress did not intend to expand traditional interstate and intrastate jurisdictional distinctions); Competitive Policy Institute reply at 10.

[100] AT&T comments at 4 (*quoting* § 251(d)(1) of the Act).

[101] AT&T comments at 4-5 (*citing Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 152-154 (1982); *City of New York v. FCC*, 467 U.S. 57, 64 (1988); *Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283 (D.C. Cir. 1994)).

[102] AT&T comments at 5 and nn.3-4; *accord* Cable & Wireless comments at 11 (in section 253, Congress made clear that the Commission has authority to preempt any state requirement that creates a barrier to either interstate or intrastate services, or that is inconsistent with the 1996 Act); MCI comments at 7-8; Sprint comments at 4.

[103] AT&T comments at 5-6.

[104] AT&T comments at 6 (section 2(b) cannot be read to nullify section 2(a) and sections 201 to 205); *cf.* (*citing California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994); *PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1990); *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *Louisiana PSC v. FCC*, 476 U.S. 355, 375-76 n.4 (1986)).

interconnection, notwithstanding the fact that it left section 2(b) unamended.[105] For example, Comcast contends that section 253(a) authorizes the Commission to preempt any state or local requirement that prohibits or has the effect of prohibiting any interstate or intrastate telecommunications service.[106] In view of the explicit grants of authority in sections 251 and 253, Comcast asserts that it was unnecessary to amend section 2(b). Cable & Wireless contends that the fact that section 251(d)(1) provides that the FCC "shall" in some cases preempt state regulations is evidence that Congress did not believe it was required to amend section 2(b) before delegating intrastate authority to the FCC.[107] AT&T asserts that the fact that prior versions of the legislation amended section 2(b) to except Part II of Title II of the Act is not dispositive; when the language was taken out, it was not listed as a substantive change, but treated as a "minor drafting" or "clerical" change.[108] AT&T asserts that this was an appropriate characterization, because section 2(b) would not have had any effect in any event.

76. Several parties contend that the Act makes clear that states are required to apply FCC rules established under section 251. For example, sections 252(c)(1) and (f)(2) explicitly require the states to apply the FCC's regulations.[109] In addition, section 261(c) provides that state requirements must be "not inconsistent" with Part II of Title II, including the Commission's regulations thereunder.[110] Thus, the parties contend that these provisions constitute express federal preemption, and that section 601(c), which provides that any preemptive effect of the new law must be express, does not establish limits to the FCC's authority to establish regulations under section 251.[111]

77. Sprint states that other provisions of the 1996 Act:

> subordinate state actions and policies with respect to intrastate service to those of the Commission, *e.g.*, sections 253 (entry barriers), 254(f) (universal service), 258 (PIC change procedures), and 276 (payphone services). If Congress had intended the jurisdictional split in section 2(b) to remain unaffected by the 1996 Act, all of these very

[105] Sprint comments at 7; Comcast reply at 2-3; NCTA reply at 5-6.

[106] Comcast reply at 2-3.

[107] Cable & Wireless reply at 9-10.

[108] AT&T reply at 4 n.5 (citing Joint Explanatory Statement at 113).

[109] AT&T reply at 2.

[110] Jones Intercable comments at 11-12; MCI reply at 7; MFS reply at 7; New Jersey Cable Ass'n, *et al.* reply at 23.

[111] New Jersey Cable Ass'n, *et al.* reply at 23; Jones Intercable reply at 15.

> specific subordinations of state policy to federal policy would be nullities, and much of the 1996 Act would make no sense at all.[112]

Sprint contends that the only way to give meaning to both section 2(b) and the above-referenced provisions is to conclude that the section 2(b) distinctions remain in effect for "retail" services offered to end users, but that the detailed scheme for intercarrier relationships set forth in Part II of Title II supersedes section 2(b).[113] MCI concurs, and adds that this interpretation is consistent with settled principles of statutory construction that the specific prevails over the general, and the later-enacted provision prevails over the earlier-enacted provision.[114]

78. Some state commissions and some other commenters assert that section 251, as well as other provisions of the 1996 Act, support the interpretation that Congress intended states to have a primary role in setting requirements for intrastate interconnection. For example, these parties assert that section 251(d)(3) is evidence that Congress intended to permit states to implement their own access and interconnection regulations, and that this statutory language requires the FCC to fashion its regulations to avoid precluding state interconnection policy or rules.[115] They note that section 251(d)(3) requires consistency with the Act, but does not mandate consistency with the FCC's regulations.[116] SNET asserts that, if Congress intended to preclude state discretion to interpret section 251 requirements, it would have preempted all state policies addressing those requirements, rather than just policies that substantially prevent implementation of the statute.[117] Some parties also point out that section 251(d)(3) is entitled "Preservation of state access regulations," and argue that the stated purpose of that provision is to preserve or "grandfather" most, if not all, state access and interconnection regulations.[118] They also allege that section 601(c) of the Act demonstrates that Congress intended to preserve states' authority over intrastate matters, and that any preemption finding

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[112] Sprint comments at 7.

[113] Sprint comments at 7-8.

[114] MCI comments at 8 (*citing Stendor Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727, 732 (4th Cir. 1991); *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984); *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir. 1982)).

[115] Maryland Commission comments at 22; Ohio Commission comments at 16-17 (*citing* Joint Explanatory Statement at 1, 119); *accord, e.g.*, Bogue, Kansas comments at 4; Connecticut Commission comments at 7; NARUC comments at 14; PacTel comments at 14; Pennsylvania Commission comments at 7-9.

[116] Maryland Commission comments at 22; Washington Commission comments at 6-7.

[117] SNET reply at 1-2; *accord* Colorado Commission comments at 5-9.

[118] Ohio Commission reply at 3; BellSouth reply at 5.

would have to be based on an express provision.[119] Bogue, Kansas states that section 256(c) also makes clear that nothing in that section expands or limits the Commission's authority prior to the enactment of the 1996 Act.[120] The Oregon Commission argues that section 261 also permits states to impose requirements, as long as those requirements are not inconsistent with the 1996 Act.[121]

79. Some state commissions and incumbent LECs contend that the Commission's authority to establish regulations that may preempt state requirements is limited to those instances where section 251 expressly provides for Commission action.[122] Some parties also contend that, because section 252(e)(5) specifically requires the FCC to assume the responsibilities of the state commission if the state commission fails to act under section 252, the FCC's role under section 252 is limited to that specific delegation of authority.[123]

80. These parties also reject the claim that section 251 takes precedence over section 2(b).[124] They note that section 2(b) was not amended by the 1996 Act, although prior version of the bills would have done so.[125] Moreover, parties claim that, in other instances, Congress did specifically amend section 2(b) to give the Commission authority over intrastate aspects of specified matters.[126] Bell Atlantic asserts that the failure to amend section 2(b) is "fatal to the notice's proposed federalization of

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[119] *See, e.g.*, District of Columbia Commission comments at 6; Maryland Commission comments at 21; NARUC comments at 13; Ohio Commission comments at 15-16; Wyoming Commission comments at 10; BellSouth reply at 5-6.

[120] Bogue, Kansas comments at 5.

[121] Oregon Commission comments at 13-14; *accord* Washington Commission comments at 9; Rural Tel. Coalition reply at 4.

[122] Rural Tel. Coalition comments at 5 (Commission authority should be limited to establishing number portability requirements, regulations for limitations on resale, minimum unbundling requirements, rules for administering the North American Numbering Plan, enforcing existing access and interconnection requirements, and determining whether to treat additional carriers as incumbent LECs); *see also* District of Columbia Commission comments at 8-10; NARUC comments at 14-15; New York Commission comments at 2-3, 8.

[123] *See, e.g.*, NARUC comments at 15; New York Commission comments at 9; PacTel comments at 13.

[124] *See, e.g.*, Bell Atlantic comments at 4; Connecticut Commission comments at 5; Oregon Commission comments at 12; Indiana Commission Staff comments at 4-5; Iowa Commission comments at 6.

[125] *See, e.g.*, Maryland Commission comments at 16 (*citing* Conf. Rep. No. 104-230 at 78 and H.R. 1555 Rep. No. 104-204 at 53); *accord* NARUC comments at 10 (*citing Russello v. U.S.*, 464 U.S. 16 (1989)); Oregon Commission comments at 15.

[126] California Commission comments at 11; Connecticut Commission comments at 7 (*citing* the Omnibus Budget Reconciliation Act of 1993 as an example of congressional intent to alter jurisdictional authority); Maryland Commission comments at 20; Ohio Commission comments at 14-15; BellSouth reply at 4

intrastate interconnection and other intrastate matters."[127] The Ohio Commission expressly rejects the suggestion in the NPRM that there was no need to amend section 2(b) because sections 251 and 252 do not affect end user rates.[128]

81. Some parties further contend that preemption must be express, not implied, and that no such express statement was made in section 251.[129] Parties also assert that, by comparison, the Act is "quite clear in preempting states where it intended to do so."[130] For example, the New York Commission asserts that, in certain circumstances, section 254(f) expressly directs states to act in a manner that is "not inconsistent" with FCC rules.[131] NARUC asserts that there is a "well established presumption against finding preemption of State law in areas traditionally regulated by the States" that weighs against an interpretation that the FCC has broad regulatory authority to establish rules governing local exchange markets.[132]

82. To support their claim that, in 1934, Congress established a dual regulatory system, and that the FCC's jurisdiction is limited to interstate issues, except where otherwise expressly provided, these parties cite to the Supreme Court's decision in *Louisiana Public Service Comm'n v. FCC*.[133] The Maryland Commission contends that *Louisiana PSC* is controlling here, because: (1) the dual regulatory system was not eliminated by the 1996 Act; (2) the FCC may not rely upon the broad congressional intent to promote competition as a delegation of authority over intrastate issues; and (3) the 1996 Act does not embody a federal regulatory scheme that is so pervasive as to infer that

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[127] Bell Atlantic comments at 7.

[128] Ohio Commission comments at 15 (the 1993 amendments to section 2(b) expressly reserved to states responsibility for wholesale rates in general).

[129] *See, e.g.*, NARUC comments at 12 (*citing Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 175 (1985)); Arizona Commission comments at 16; Bogue, Kansas comments at 3 (*citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); New York Commission comments at 6 (*citing Washington Market v. Hoffman*, 101 U.S. 112 (1879)); Municipal Utilities reply at 5 (FCC may not preempt state regulations that are consistent with the Act).

[130] Bogue, Kansas comments at 4 n.3 (section 251(e) gives FCC "exclusive jurisdiction" over some aspects of Number Administration); Maryland Commission comments at 15; Ohio Commission comments at 12, 16.

[131] New York Commission comments at 8; *see also* NARUC comments at 12 (contrasting section 276, which explicitly provides that Commission regulations shall preempt inconsistent state requirements).

[132] NARUC comments at 12 (*quoting California v. ARC America Corp.*, 490 U.S. 91, 101 (1989)).

[133] 476 U.S. 335 (1986) (*Louisiana PSC*). In that case, the Supreme Court held that section 220 of the 1934 Act, which directs the FCC to set depreciation regulations, did not give the FCC authority to preempt inconsistent state depreciation regulations for intrastate ratemaking purposes.

Congress left no room for states to supplement it.[134] PacTel claims that, because section 251 was created after the decision in *Louisiana PSC*, Congress was aware that, if it wanted section 251 to override section 2(b), it would have to do so in an unambiguous manner. Consequentially, because Congress did not amend section 2(b) or otherwise expressly limit its effect, section 2(b) takes precedence over section 251 to the extent the provisions conflict.[135] Several parties offer additional bases for finding that the *Louisiana PSC* decision controls the scope of the Commission's authority under section 251.[136]

3. Discussion

83. We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act.[137] That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues.[138] Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.

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[134] Maryland Commission comments at 17-18 (*citing Fidelity Savings and Loan Assn v. de la Cuesta*, 458 U.S. 141, 153 (1982)); *accord* Ohio Commission comments at 11; Oregon Commission comments at 13; Washington Commission comments at 9-10.

[135] PacTel comments at 14-15.

[136] The Maryland Commission further asserts that compliance with both federal and state regulation as envisioned by the 1996 Act is not a physical impossibility that would support a claim of implied preemption. Maryland Commission comments at 18 (*citing Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)); *accord* Washington Commission comments at 10. The Ohio Commission avers that it is possible for the FCC to promulgate rules that apply to interstate services only. Ohio Commission comments at 13. Several states also reject the idea that section 251 squarely addresses, and therefore controls, the jurisdictional issue, because there is "no mention of intrastate services or preemption of states' authority over such matters in Section 251." Ohio Commission comments at 12; Maryland Commission comments at 23; *accord* Bell Atlantic comments at 6. Pacific Telesis asserts that sections 251 and 2(b) may be read as internally consistent, and that, under rules of statutory construction, they must be so interpreted. PacTel comments at 12-13 (*citing Washington Market Co v. Hoffman*, 101 U.S. 112 (1879)). Bell Atlantic states that the Supreme Court held in *Louisiana PSC* that the rule of statutory construction that the specific takes precedence over the general does not apply where two provisions "address 'different subject[s]' and therefore 'are not general or specific with respect to each other.'" Bell Atlantic comments at 6 (*quoting Louisiana PSC*, 476 U.S. at 376 n.5); GTE reply at 5.

[137] According to Senator Pressler, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to design *a national policy framework* -- a new regulatory paradigm for telecommunications -- which accommodates and accelerates technological change and innovation." 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (emphasis added). According to Representative Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . .", 142 Cong. Rec. H1149 (Feb. 1, 1996).

[138] For example, section 253(a) suggests that states may establish regulations regarding interstate as well as intrastate matters.

84. For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[139]

85. We view sections 251 and 252 as creating parallel jurisdiction for the FCC and the states. These sections require the FCC to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252. Among other things, the fact that the Commission is required to assume the state commission's responsibilities if the state commission fails to carry out its section 252 responsibilities[140] gives rise to the inevitable inference that both the states and the FCC are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252.

86. The only other possible interpretations would be that: (1) sections 251 and 252 address only interstate aspects of interconnection, services, and access to unbundled elements; (2) the provisions address only the intrastate aspects of those issues; or (3) the FCC's role is to establish rules for interstate aspects, and the states' role is to arbitrate and approve agreements on intrastate aspects. As explained below, none of these interpretations withstands examination. Accordingly, we conclude that sections 251 and 252 address both interstate and intrastate aspects of interconnection services and access to unbundled elements.

87. Some parties have argued that our authority under section 251 is limited by section 2(b). Ordinarily, in light of section 2(b), we would interpret a provision of the Communications Act as addressing only the interstate jurisdiction unless the provision (as well as section 2(b) itself) provided otherwise. That interpretation is contradicted in this case, however, by strong evidence in the statute that the local competition provisions of the 1996 Act are directed to both intrastate and interstate

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[139] We believe that this interpretation is the most reasonable one in light of our expectation that marketing and product offerings by telecommunications carriers will diminish or eliminate the significance of interstate-intrastate distinctions.

[140] *See* 47 U.S.C. § 252(e)(5).

matters. For example, section 251(c)(2), the interconnection requirement, requires LECs to provide interconnection "for the transmission and routing of *telephone exchange service* and exchange access."[141] Because telephone exchange service is a local, intrastate service, section 251(c)(2) plainly addresses intrastate service, but it also addresses interstate exchange access. In addition, we note that in section 253," the statute explicitly authorizes the Commission to preempt intrastate and interstate barriers to entry.[142]

88. More generally, if these sections are read to address only interstate services, the grant of substantial responsibilities to the states under section 252 is incongruous. A statute designed to develop a *national* policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also to implement its national policies by enhancing our authority to encompass rulemaking authority over intrastate interconnection matters.[143]

89. Some parties argue that section 251 addresses solely intrastate matters. We do not find this argument persuasive.[144] Under this narrow view, section 251(c)(6) requiring incumbent LECs to offer physical collocation would apply only to equipment used for intrastate services, while new entrants would be limited to the use of virtual collocation for equipment used in the provision of interstate services, pursuant to the decision in *Bell Atlantic*.[145] Such an interpretation would force new entrants to use different methods of collocation based on the jurisdictional nature of the traffic involved, and would thereby greatly increase new entrants' costs. Moreover, such an interpretation would fail to give effect to Congress's intent in enacting section 251(c)(6) to reverse the result reached in *Bell Atlantic*.[146]

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[141] 47 U.S.C. § 251(c)(2).

[142] 47 U.S.C. § 253(a).

[143] The legislative history is replete with statements indicating that Congress meant to address intrastate local exchange competition. For instance, Senator Lott stated that "[i]n addressing *local and long distance issues*, creating an open access and sound interconnection policy was the key objective . . ." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Representative Markey noted that "we take down the barriers of *local and long distance* and cable company, satellite, computer software entry into any business they want to get in." 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added).

[144] *See, e.g.*, New York Commission comments at 5-8.

[145] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*) (holding that the Commission did not have authority to require physical collocation for the provision of interstate services).

[146] The language in the House bill which closely matches the language that appears in section 251(c)(6), noted that a provision requiring physical collocation was necessary "because a recent court decision indicates that the Commission lacks authority under the Communications Act to order physical collocation." H.R. Rep. No. 204, pt. I, 104th Cong., 1st Sess., at 73 (1995).

90. Another factor that makes clear that sections 251 and 252 did not address exclusively intrastate matters is the provision in section 251(g), "Continued Enforcement of Exchange Access and Interconnection Requirements." That section provides that BOCs must follow the Commission's "equal access and nondiscriminatory interconnection restrictions (including receipt of compensation)" until they are explicitly superseded by Commission regulations after the date of enactment of the 1996 Act. This provision refers to existing Commission rules governing interstate matters, and therefore it contradicts the argument that section 251 addresses intrastate matters exclusively.

91. Nor does the savings clause of section 251(i) require us to conclude that sections 251 and 252 address only intrastate issues. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." This subsection merely affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities. It does not act as a limitation on the agency's authority under section 251.

92. As to the third possible interpretation, the FCC's role is to establish rules for only the interstate aspects of interconnection, and the states' role is to arbitrate and approve only the intrastate aspects of interconnection agreements. No commenters support this position, and we find that it would be inconsistent with the 1996 Act to read into sections 251 and 252 such a distinction. The statute explicitly contemplates that the states are to comply with the Commission's rules, and the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its section 252 responsibilities.[147] Thus, we believe the only logical conclusion is that the Commission and the states have parallel jurisdiction. We conclude, therefore, that these sections can only logically be read to address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements, and thus to grant the Commission authority to establish regulations under 251, binding on both carriers and states, for both interstate and intrastate aspects.

93. Section 2(b) of the Act does not require a different conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .".[148] As stated above, however, we have found that sections 251 and 252 do apply to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[149] In enacting sections 251 and

[147] 47 U.S.C. § 252(e)(5).

[148] 47 U.S.C. § 152(b).

[149] 47 U.S.C. § 152(b).

252 after section 2(b), and squarely addressing therein the issue of interstate and intrastate jurisdiction, we find that Congress intended for sections 251 and 252 to take precedence over any contrary implications based on section 2(b).[150] We note also, that in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[151] Section 253 directs the FCC to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[152] Section 276(d) provides that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[153] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the FCC jurisdiction over intrastate matters. Thus, we believe that the lack of an explicit exception in section 2(b) should not be read to require an interpretation that the Commission's jurisdiction under sections 251 and 252 is limited to interstate services. A contrary holding would nullify several explicit grants of authority to the FCC, noted above, and would render parts of the statute meaningless.[154]

94. Some parties find significance in the fact that earlier drafts of the legislation would have amended section 2(b) to make an exception for Part II of Title II, including section 251, but the enacted version did not include that exception. These parties argue that this change in drafting demonstrates an intention by Congress that the limitations of section 2(b) remain fully in force with regard to sections 251 and 252. We find this argument unpersuasive.

95. Parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction

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[150] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it as a commonplace of statutory construction that the specific governs the general"); *see also* 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will); *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196, 200 (2nd Cir. 1974).

[151] 47 U.S.C. § 251 (e)(1).

[152] 47 U.S.C. § 276(b).

[153] 47 U.S.C. § 276(d).

[154] *See* Sprint comments at 7.

has been rejected, however, when changes from one draft to another are not explained.[155] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement of the Conference Report. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[156] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. Moreover, it seems implausible that, by selecting the final version, Congress intended a radical alteration of the Commission's authority under section 251, given the total lack of legislative history to that effect. We conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under sections 251 and 252, and would have had no practical effect.[157]

96. Some parties have argued that, to the extent that sections 251 and 252 address intrastate matters, the Commission's rulemaking authority under those sections is limited to those instances where Commission action regarding intrastate matters is specifically mandated, such as number administration. We disagree. There is no language limiting the Commission's authority to establish rules under section 251. To the contrary, section 251(d)(1) affirmatively requires Commission rules, stating that "the Commission *shall* complete *all* actions necessary to implement the requirements of *this section*."[158] Pursuant to sections 4(i), 201(b), and 303(r) of the Act, the Commission generally has rulemaking authority to implement all provisions of the Communications Act. Courts have held that the Commission, pursuant to its general rulemaking authority, has "expansive" rather than limited powers.[159] Further, where Congress has expressly delegated to the Commission rulemaking responsibility with respect to a particular matter, such delegation constitutes "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations . . .".[160] Indeed, to read these

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[155] *Mead Corp v. Tilley*, 490 U.S. 714, 723 (1989); *Rastelli v. Warden*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

[156] Joint Explanatory Statement at 113.

[157] AT&T reply at 4 n.5.

[158] 47 U.S.C. § 251(d)(1) (emphasis added).

[159] *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); *see also Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978).

[160] *Fulani v. FCC*, 49 F.3d 904, 909 (2d Cir. 1995) (cite omitted); *see also Kay v. FCC*, 443 F.2d 638, 640 (D.C.Cir. 1970).

provisions otherwise would negate the requirement that states ensure that arbitrated agreements are consistent with the Commission's rules. Thus, the explicit rulemaking requirements pointed out by some of the parties is best read as giving the Commission more jurisdiction than usual, not less. We believe that the delegation of authority set forth in section 251(d)(1) is "expansive" and not limited. We therefore reject assertions that the Commission has authority to establish regulations regarding intrastate matters only with respect to certain provisions of section 251, such as number administration.

97. Moreover, the Court in *Louisiana PSC* does not suggest a different result. The reasoning in *Louisiana PSC* applies to the dual regulatory system of the 1934 Act. As set forth above, however, in sections 251-253, Congress amended the dual regulatory system that the Court addressed in *Louisiana PSC*. As a result, preemption in this case is governed by the usual rule, also recognized in *Louisiana PSC*, that an agency, acting within the scope of its delegated authority, may preempt inconsistent state regulation.[161] As discussed above, Congress here has expressed an intent that our rules apply to intrastate interconnection, services, and access to network elements. Therefore, *Louisiana PSC* does not foreclose our adoption of regulations under section 251 to govern intrastate matters.

98. Parties have raised other arguments suggesting that the Commission lacks authority over intrastate matters. We are not persuaded by the argument that sections 256(c) and 261, as well as section 601(c) of the 1996 Act, evince an intent by Congress to preserve states' exclusive authority over intrastate matters. In fact, section 261 supports the finding that the Commission may establish regulations regarding intrastate aspects of interconnection, services and access to unbundled elements that the states may not supersede. Section 261(b) *generally* permits states to enforce regulations prescribed prior to the date of enactment of the 1996 Act, and to prescribe regulations after such date, if such regulations are not inconsistent with the provisions of Part II of Title II.[162] Section 261(c) *specifically* provides that nothing in Part II of Title II "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part *or the Commission's regulations to implement this part*."[163] We conclude that state access and interconnection obligations referenced in section 251(d)(3) fall within the scope of section 261(c). Section 261(c), as the more specific provision, controls over section 261(b) for matters that fall within its scope.[164] We note, too, that section 261(c) encompasses all state

[161] *Louisiana PSC*, 476 U.S. at 368.

[162] 47 U.S.C. § 261(b).

[163] 47 U.S.C. § 261(c) (emphasis added).

[164] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

requirements. It is not limited to requirements that were prescribed prior to the enactment of the 1996 Act. By providing that state requirements for *intrastate* services must be consistent with the Commission's regulations, section 261(c) buttresses our conclusion that the Commission may establish regulations regarding intrastate aspects of interconnection, services, and access to unbundled elements.

99. Section 601 of the 1996 Act and section 256 also are consistent with our conclusion. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[165] We conclude that section 251(d)(1), which requires the Commission to "establish regulations to implement the requirements of this section,"[166] and section 261(c), were expressly intended to modify federal and state law and jurisdictional authority.

100. Section 256, entitled "Coordination for Interconnectivity," has no direct bearing on the issue of the Commission's authority under section 251, because it provides only that "[n]othing *in this section* shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."[167] That provision is relevant, however, as a contrast to section 251, which does not contain a similar statement that the scope of the Commission's authority is unchanged by section 251.[168]

101. We further conclude that the Commission's regulations under section 251 are binding on the states, even with respect to intrastate issues. Section 252 provides that the agreements state commissions arbitrate must comply with the Commission's regulations established pursuant to section 251. In addition, section 253 requires the Commission to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[169] As discussed above, section 261(c) provides further support for the conclusion that states are bound by the regulations the Commission establishes under section 251.

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[165] 47 U.S.C. § 601(c)(1).

[166] 47 U.S.C. § 251(d)(1).

[167] 47 U.S.C. § 256(c) (emphasis added).

[168] *Russello v. United States*, 464 U.S. 16, 23 (1983); *Cramer v. Internal Revenue Service*, 64 F.3d 1406, 1412 (9th Cir. 1995) (where Congress includes a provision in one section of statute but omits it in another section of the same Act, it should not be implied where it is excluded).

[169] 47 U.S.C. § 253(a).

102. We disagree with claims that section 251(d)(3) "grandfathers" existing state regulations that are consistent with the 1996 Act, and that such state regulations need not comply with the Commission's implementing regulations. Section 251(d)(3) only specifies that the Commission may not preclude enforcement of state access and interconnection requirements that are consistent with section 251, and that do not substantially prevent implementation of the requirements of section 251 or the purposes of Part II of Title II. In this Report and Order, we set forth only such rules that we believe are necessary to implement fully section 251 and the purposes of Part II of Title II. Thus, state regulations that are inconsistent with our rules may "substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]."[170]

103. We are not persuaded by arguments that, because other provisions of the 1996 Act specifically require states to comply with the Commission's regulations, the absence of such requirement in section 251(d)(3) indicates that Congress did not intend such compliance. Section 251(d)(3) permits states to prescribe and to enforce access and interconnection requirements only to the extent that such requirements "are consistent with the requirements" of section 251[171] and do not "substantially prevent implementation" of the requirements of section 251 and the purposes of Part II of Title II.[172] The Commission is required to establish regulations to "implement the requirements of the section."[173] Therefore, in order to be consistent with the requirements of section 251 and not "substantially prevent" implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations.[174]

D. Commission's Legal Authority and the Adoption of National Pricing Rules

1. Background

104. In the NPRM, we sought comment on our tentative conclusion that sections 251(c)(2), (c)(3), and (c)(6) establish the Commission's legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to unbundled network

[170] 47 U.S.C. § 251(d)(3)(C).

[171] 47 U.S.C. § 251(d)(3)(B).

[172] 47 U.S.C. § 251(d)(3)(C).

[173] 47 U.S.C. § 251(d)(1).

[174] We recognize that, in some instances, whether particular state requirements are consistent with the Commission's rules may need to be considered on a case-by-case basis.

elements, and collocation are just, reasonable, and nondiscriminatory.[175] We also sought comment on our tentative conclusion that sections 251(b)(5) and 251(c)(4) establish our authority to define "wholesale rates" for purposes of resale, and "reciprocal compensation arrangements" for purposes of transport and termination of telecommunications services.[176] In addition, we asked parties to comment on our tentative conclusion that the Commission's statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.[177]

105. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.[178] We also sought comment on the potential consequences of the Commission not establishing specific pricing rules.[179]

2. Comments

106. *Legal Authority*. The Department of Justice, GSA/DoD, many potential new entrants, and a few state commissions maintain that the Act gives the Commission a critical role in establishing national pricing rules to ensure that the rates for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[180] They contend that section 251(d)(1) specifically directs the Commission, without limitation, to develop pricing rules governing transport and termination, interconnection, the provisioning of unbundled network elements, and

[175] NPRM at para. 117.

[176] *Id*. at 118.

[177] *Id*. at para. 118.

[178] *Id*. at para. 119.

[179] *Id*.

[180] *See, e.g.*, DoJ comments at 24-25; GSA/DoD comments at 8, reply at 6; Teleport comments at 44; ALTS comments at 33; GST comments at 25-26; Hyperion comments at 19; ACSI comments at 53, reply at 18-19; MFS comments at 49; MCI comments at 59; Sprint comments at 42; Cox comments at 22; TCI comments at 6; Time Warner comments at 45; WinStar comments at 28, reply at 6-7; Comcast reply at 12; AT&T reply at 5; Kentucky Commission comments at 3; Wyoming Commission comments at 27; *see also* NCTA comments at 8-9; Texas Public Utility Counsel comments at 15; Jones Intercable comments at 10-12, reply at 10-13 (arguing that the Commission should adopt national binding pricing rules); New Jersey Cable Ass'n *et al*. reply at 6-9, 11 (arguing that the pricing rules adopted by the Commission should be binding); Vanguard reply at 4-5.

resale.[181] These parties maintain that nothing in sections 251 and 252 expressly precludes the Commission from establishing pricing rules for the states to apply.[182] Therefore, they argue that the broad grant of authority under section 251(d)(1) includes authority to establish pricing rules.[183]

107. On the other hand, most state commissions, BOCs, and incumbent LEC trade associations contend that nothing in the 1996 Act specifically authorizes the Commission to adopt pricing rules.[184] A group of state commissions and NARUC contend that the Commission's authority to implement the requirements of section 251 is limited to the express activities assigned to the Commission in that section, such as prescribing regulations for resale and numbering portability, determining unbundled network elements, and establishing a North American Numbering Plan Administrator (NANPA) and a cost recovery mechanism for the administrators' operations.[185] The New York Commission contends that the 1996 Act is unambiguous in reserving intrastate pricing to the states under section 252(d), and that any Commission regulations would apply only to states that do not act to open local markets to competition and to those provisions in section 251 that require specific Commission rules.[186] The Ohio Commission asserts that section 251(d)(3) explicitly provides that the Commission shall not preclude states from enforcing or implementing the requirements of section 251, as long as the state's policy is consistent with section 251.[187]

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[181] DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

[182] *Id*; *see also* Citizens Utilities comments at 15-16.

[183] DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

[184] *See, e.g.*, Wisconsin Commission comments at 4; Ohio Commission comments at 36-39; Florida Commission comments at 24-25; Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Washington Commission comments at 23; Maryland Commission comments at 11; South Carolina Commission comments at 2; Minnesota Commission reply at 2-3; Nebraska Rural Development Commission comments at 1; Virginia Commission Staff comments at 2-3; Mass. Commission comments at 4; Idaho Commission comments at 10; New York Commission comments at 10, 23; reply at 4-5; Georgia Commission comments at 2-3, 7; Arizona Commission comments at 18; District of Columbia Commission comments at 24- 28 (stating that the Commission has authority to adopt non-binding guidelines that would be helpful to states); Missouri Commission comments at 7-8; Texas Commission comments at 21; Alabama Commission comments at 6, 9, 22; Maine Commission, *et al*. comments at 2-4; Illinois Commission comments at 8, 41; Indiana Commission comments at 4-5; New Hampshire Commission, *et al*. reply at 3; NARUC comments at 16-20; reply at 3-5; PacTel comments at 13, 63; SBC comments at 51-53, 70-71; BellSouth comments at 48-49; reply at 31-32; Rural Tel. Coalition comments at 24; USTA comments at 4-5; GTE comments at 59, reply at 3-5; SNET comments at 28; TDS comments at 17 n.14.

[185] NARUC comments at 14-15; Maine Commission, *et al*. comments at 2-4; *see also* GTE comments at 6-7.

[186] New York Commission comments at 2-3; *see also* Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission Staff comments at 3.

[187] Ohio Commission comments at 36-39.

108. The Illinois Commission states that section 252(d) governs pricing standards for interconnection and network element charges, transport and termination of traffic, and wholesale services.[188] It argues that each provision expressly establishes standards under which state commissions are to determine prices, without reference to any Commission rulemaking.[189] The Illinois Commission further contends that in establishing standards for state commissions to apply during arbitration under section 252(b), subsections 252(c)(1) and 252(c)(2) distinguish between section 251 and the Commission's regulations prescribed thereunder, and the pricing standards set forth in section 252(d), which do not reference any Commission regulations.[190] The Illinois Commission infers from these subsections that Congress did not intend for the Commission to exercise broad rulemaking authority under sections 251 and 252.[191] Other state commissions similarly argue that the general language of section 251(c)(2)(D) and the specific grant of authority to states under section 252(d) to price interconnection elements reveal Congress's intent to confer responsibility over pricing on the states.[192]

109. *National Standards*. The Department of Justice, the SBA, and most of the IXCs, CAPs, and cable companies addressing this issue agree that the Commission should establish national pricing rules for interconnection and unbundled elements under 252(d)(1) for the reasons stated in the NPRM.[193] Citizens Utilities, NEXTLINK, and WinStar also support the Commission's tentative conclusion that national pricing rules should be adopted to guide the states in facilitating the negotiation and arbitration process.[194] The majority of consumer organizations urge the Commission to establish uniform, national rules and argue that inconsistent and unpredictable state rules would inhibit or delay

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[188] Illinois Commission comments at 7.

[189] *Id.*

[190] *Id*. at 8, 41.

[191] *Id.*

[192] Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission comments at 2-3; Mass. Commission comments at 4; Arizona Commission comments at 18.

[193] *See, e.g.,* DoJ comments at 25-26; SBA comments at 4; LDDS comments at 19-20, 58; AT&T comments at 45; LCI comments at 3, 12; MCI comments at 59; Sprint comments at 42, reply at 5-11; CompTel comments at 19-22; Varteks *et al*. comments at 10 (national pricing standards for databases); ALTS comments at 33; Teleport comments at 45-46, reply at 32; Hyperion comments at 3, reply at 5-6; ASCI comments at 51-53; Intermedia comments at 14; MFS comments at 52-54, 58, 64; Cable & Wireless comments at 32; Cox comments at 12, 22, reply at 5, 13-16; Comcast comments at 44; Continental comments at 16; TCI comments at 22-24, reply at 1-3; Jones Intercable comments at 2-4, reply at 3, 9; Time Warner comments at 47, reply at 2, 7-9; *see also* Vanguard reply at 3, 7-9.

[194] *See, e.g.,* Citizens Utilities comments at 15-16; NEXTLINK comments at 24-25; WinStar comments at 28; *see also* CompTel comments at 19-20.

the efforts of new entrants to obtain interconnection arrangements with incumbent LECs and undermine their ability to raise capital in the financial markets.[195] Several state commissions also support the adoption of national rules. For example, the Kentucky Commission contends that national pricing rules would facilitate competitive entry,[196] and the North Dakota Commission argues that such national rules would provide significant assistance to those states that have not opened their local markets to competition.[197]

110. The RBOCs, with the exception of Ameritech, generally oppose the adoption of national pricing rules on legal and policy grounds.[198] The majority of states also express opposition to national pricing rules and argue that section 251(d)(3) reserves to the states the details of local service competition.[199] Other state commissions advocate that the Commission should adopt either preferred outcomes for interconnection that narrow the range of issues in arbitration and negotiation,[200] or general nonbinding guidelines that recognize the rights of states to adopt their own pricing standards.[201] For instance, the Illinois Commission contends that, if the Commission finds that it has authority to establish pricing rules to govern the states, it could determine that rates for interconnection and unbundled network elements are to be based upon forward-looking costs rather than historical costs, and leave all

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[195] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 3-4, 11, 29-32; SDN Users Ass'n comments at 2; CFA/CU comments at 26; Competition Policy Institute comments at 9-10, reply at 10; *see also* ITIC comments at 3-5; TRACER comments at 37, reply at 6; NTIA reply at 15-16.

[196] *See, e.g.*, Kentucky Commission comments at 4; *see also* Texas Public Utility Counsel comments at 15.

[197] *See, e.g.*, North Dakota Commission comments at 1-2.

[198] *See, e.g.*, NYNEX comments at 40-41; SBC comments at 48, 50, reply at 29, 33; PacTel comments at 2, 8, 64, and 65, reply at 23; BellSouth comments at 49, 55, reply at 33; Ameritech comments at 59 (favoring national pricing principles that allow incumbent LECs to recover all costs); *see also* Cincinnati Bell comments at 20 (supporting FCC rules, but arguing that rules should only be general and for the purpose of guiding states in the negotiation and arbitration process).

[199] *See, e.g.*, Ohio Commission comments at 39-40; Colorado Commission comments at 28, reply at 4-6; Wyoming Commission comments at 20, 27-29; Minnesota reply at 2-3; Maryland Commission comments at 12; New York Commission comments at 11-12, reply at 9-10; Georgia Commission comments at 7, reply at 1; Indiana Commission comments at 2, 21; Alaska Commission comments at 4; Missouri Commission comments at 8; Oregon Commission comments at 30; Alabama Commission comments at 20-21; North Carolina Commission comments at 10; Maine Commission, *et al.* comments at 2-3; California Commission comments at 11-12, reply at 18; Arizona Commission comments at 19; Connecticut Commission comments at 9-10; Washington Commission reply at 2; New Hampshire Commission, *et al.* reply at 2-3; Mississippi Commission comments at 13; Pennsylvania Commission comments at 26; NARUC comments at 23, 24, reply at 12-13; Florida Commission comments at 25; *see also* Ohio Consumers' Counsel comments at 21, 27; MECA comments at 39-41; Municipal Utilities comments at 17-18, reply at 7; Attorneys General, *et al.* reply at 2, 7; Puerto Rico Tel. comments at 5-6; reply at 9-10; Alaska Tel. Ass'n comments at 2.

[200] *See* Washington Commission comments at 2.

[201] *See, e.g.*, Pennsylvania Commission comments at 28; South Carolina Commission comments at 3; Illinois Commission comments at 41, reply at 12-13; Washington Commission comments at 2, 22; *see also* NYNEX comments at 42.

other details to the states. In addition, the Illinois Commission argues that any pricing standards that the Commission prescribes should be focused narrowly on those services addressed in section 252(d).[202] The Iowa Commission maintains that the Commission's rules may be explicit only to the extent that they prohibit state policies that are inconsistent with section 251.[203] Some incumbent LEC trade associations suggest that the Commission adopt only broad guidelines and minimum pricing requirements.[204] NADO, Joint Consumer Advocates, and the Rural Tel. Coalition oppose the adoption of any national pricing rules on the ground that such a regime would not allow for flexibility and innovation.[205] The Rural Tel. Coalition further asserts that if the Commission insists on prescribing pricing standards for all states, it must take into account the myriad of different classes of customers, geographic characteristics, population densities, and technologies.[206]

3. Discussion

111. In adopting sections 251 and 252, we conclude that Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled elements.[207] We interpret the Commission's role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory: in doing so, we believe it to be within our discretion to adopt national pricing rules in order to ensure that rates will be just, reasonable, and nondiscriminatory. The Commission is also responsible for ensuring that interconnection, collocation, access to unbundled elements, resale services, and transport and termination of telecommunications are reasonably available to new entrants.[208] The states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d).

112. While we recognize that sections 201 and 202 create a very different regulatory regime from that envisioned by sections 251 and 252, we observe that Congress used terms in section 251,

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[202] *See* Illinois Commission comments at 41-43.

[203] *See* Iowa Commission comments at 5.

[204] *See, e.g.,* NECA comments at 6; USTA comments at 37; *see also* George Washington Urban League comments at 2; Alliance for Public Technology comments at 9-11, reply at 1; ALLTEL comments at 4-7, reply at summary.

[205] *See* NADO, *et al.* at 4, 6; Joint Consumer Advocates reply at 9-10; Rural Tel. Coalition comments at 19, reply at 13-14.

[206] Rural Tel. Coalition comments at 19, reply at 14.

[207] *See infra*, Sections VII and VIII.

[208] For a further discussion of specific pricing rules, *see infra*, Section VII.

such as the requirement that rates, terms, and conditions be "just, reasonable, and nondiscriminatory," that are very similar to language in sections 201 and 202. This lends additional support for the proposition that Congress intended to give us authority to adopt rules regarding the justness and reasonableness of rates pursuant to section 251, comparable in some respects to the authority Congress gave us pursuant to sections 201 and 202.

113. We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. Congress intended these sections to promote opportunities for local competition, and directed us to establish regulations to ensure that rates under this regime would be economically efficient. This, in turn, should reduce potential entrants' capital costs, and should facilitate entry by all types of service providers, including small entities.[209] Further, we believe that national rules will help states review and arbitrate contested agreements in a timely fashion. From August to November and beyond, states will be carrying the tremendous burden of setting specific rates for interconnection and network elements, for resale, and for transport and termination when parties bring these issues before them for arbitration. As discussed in more detail below, we are setting forth default proxies for states to use if they are unable to set these rates using the necessary cost studies within the statutory time frame. After that, both we and the states will need to review the level of competition, revise our rules as necessary, and reconcile arbitrated interconnection arrangements to those revisions on a going-forward basis.

114. We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252.[210] In addition, under the national pricing rules that we adopt for interconnection and unbundled network elements, states will retain the flexibility to consider local technological, environmental, regulatory, and economic conditions. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital. In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants.

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[209] *See* Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.

[210] *See* 47 U.S.C.§ 252(e)(6).

115. As we observed in the NPRM,[211] section 251 explicitly sets forth certain requirements regarding rates for interconnection, access to unbundled elements, and related offerings. Sections 251(c)(2) and (c)(3) require that incumbent LECs' "*rates*, terms, and conditions" for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of sections 251 and 252."[212] Section 251(c)(4) requires that incumbent LECs offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions or limitations.[213] Section 251(c)(6) provides that all LECs must provide physical collocation of equipment, "on *rates*, terms, and conditions that are just, reasonable, and nondiscriminatory."[214] Section 251(b)(5) requires that all LECs "establish reciprocal *compensation* arrangements for the transport and termination of telecommunications."[215] Section 251(d)(1) further expressly directs the Commission, without limitation, to "complete all actions necessary to implement the requirements of [section 251]."[216]

116. Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements. Section 252(c)(1) provides that "in resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251*."[217]

117. We conclude that, under section 251(d)(1), Congress granted us broad authority to complete all actions necessary to implement the requirements of section 251, including actions necessary to ensure that rates for interconnection, access to unbundled elements, and collocation are "just, reasonable, and nondiscriminatory."[218] We also determine that the statute grants us the authority

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[211] NPRM at para. 117.

[212] 47 U.S.C. §§ 251(c)(2) and (c)(3) (emphasis added).

[213] 47 U.S.C. § 251(c)(4) (emphasis added).

[214] 47 U.S.C. § 251(c)(6) (emphasis added).

[215] 47 U.S.C. § 251(b)(5) (emphasis added).

[216] 47 U.S.C. § 251(d)(1).

[217] 47 U.S.C. § 252(c)(1) (emphasis added).

[218] *See* 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6).

to define reasonable "wholesale rates" for purposes of services to be resold, and "reciprocal compensation" for purposes of transport and termination of telecommunications.[219] The argument advanced by the New York Commission, NARUC, and others that the Commission's implementing authority under section 251(d)(1) is limited to those provisions in section 251 that mandate specific Commission rules, such as prescribing regulations for number portability, unbundling, and resale, reads into section 251(d)(1) limiting language that the section does not contain. Congress did not confine the Commission's rulemaking authority to only those matters identified in sections 251(b)(2), 251(c)(4)(B), and 251(d)(2), and there is no basis for inferring such an implicit limitation. A narrow reading of section 251(d)(1), as proposed by the New York Commission, NARUC, and others, would require the Commission to neglect its statutory duty to implement the provisions of section 251 and to promote rapid competitive entry into local telephone markets.

118. We also reject the arguments raised by several state commissions that the language in section 252(c) indicates Congress's intent for the Commission to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. We do not believe that the statutory directive that state commissions establish rates according to section 252(d) restricts our authority under section 251(d)(1). States must comply with both the statutory standards under section 252(d) *and* the regulations prescribed by the Commission pursuant to section 251 when arbitrating rate disputes or when reviewing BOC statements of generally available terms. Section 252(c) enumerates three requirements that states must follow in arbitrating issues.[220] These requirements are not set forth in the alternative; rather, states must comply with all three.

119. We further reject the argument that section 251(d)(3) restricts the Commission's authority to establish national pricing regulations. Section 251(d)(3) provides that the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that, *inter alia*, is consistent with the requirements of section 251 and does not substantially prevent implementation of the requirements of section 251. This subsection, as discussed in section II.C., *supra*, is intended to allow states to adopt regulations that are not inconsistent with the Commission's rules; it does not address state policies that are inconsistent with the pricing rules established by the Commission.

120. We also address the impact of our rules on small incumbent LECs. For example, Rural Tel. Coalition argues that rigid rules, based on the properties of large urban LECs, cannot blindly be applied to small and rural LECs.[221] As discussed above, however, we believe that states will retain

[219] *See* 47 U.S.C. §§ 251(b)(5) and (c)(4).

[220] *See* 47 U.S.C. §§ 252(c)(1), (c)(2), and (c)(3).

[221] Rural Tel. Coalition reply at 14.

sufficient flexibility under our rules to consider local technological, environmental, regulatory, and economic conditions. We also note that section 251(f) may provide relief to certain small carriers.[222]

E. Authority to Take Enforcement Action

1. Background

121. The Commission's implementation of section 251 must be given full effect in arbitrated agreements and incorporated into all such agreements. There is judicial review of such arbitrated agreements, and one issue surely will be the adherence of these agreements to our rules. The Commission will have the opportunity to participate, upon request by a party or a state or by submitting an *amicus* filing, in the arbitration or the judicial review thereof. To clarify our potential role, we consider the extent of the Commission's authority to review and enforce agreements entered into pursuant to section 252. Section 252(e)(6) provides that, in "any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section."[223]

122. In the NPRM, we sought comment on the relationship between sections 251 and 252 and the Commission's existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . ."[224] We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252. We also sought comment on the relationship between sections 251 and 252 and any other applicable Commission enforcement authority. We further sought comment on how we might increase the effectiveness of the Commission's enforcement mechanisms. Specifically, we asked for comment on how private rights of action might be used under the Act, and the Commission's role in speeding dispute resolution in forums used by private parties.

2. Comments

[222] *See* 47 U.S.C. § 251(f).

[223] 47 U.S.C. § 252(e)(6).

[224] *See* 47 U.S.C. § 208;*see also* NPRM at para. 41.

123. The majority of commenters agree that the Commission's section 208 complaint authority extends to the acts or omissions of common carriers in contravention of sections 251 and 252.[225] TCI further asserts that the Commission retains authority to issue declaratory rulings pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e), and to initiate investigations pursuant to section 403 of the Communications Act.[226] Several state commissions argue, however, that allowing parties to file section 208 complaints would be inconsistent with the states' preeminent role under sections 251 and 252, at least in some circumstances. For example, the New York Commission contends that, to the extent that sections 251 and 252 apply to both interstate and intrastate services, the FCC only has authority to hear complaints regarding interstate communications.[227] The Illinois Commission asserts that a section 208 remedy would be appropriate only after an agreement is implemented, and only to the extent the complaint does not allege that the agreement violates standards set forth in sections 251 and 252.[228]

3. Discussion

124. Consistent with our decision in *Telephone Number Portability*[229] and the views of most commenters, we conclude that parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.[230] Federal district courts may choose to stay or dismiss proceedings brought pursuant to section 252(e)(6), and refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission under the primary jurisdiction doctrine.[231] We find,

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[225] *See, e.g.*, ALTS comments at 7; AT&T comments at 10-11; BellSouth comments at 9; CompTel comments at 103; Florida Commission comments at 10-11; Ind. Cable & Telecomm. Ass'n reply at 4; Jones Intercable comments at 13-14; MCI comments at 7-8; MFS comments at 8-9; Ohio Commission comments at 17; Sprint comments at 8-9; TCI comments at 10; TCC comments at 62.

[226] TCI comments at 10.

[227] New York Commission reply; *see also* Wyoming Commission comments at 15-16.

[228] Illinois Commission comments at 16-18.

[229] *See Number Portability Order*.

[230] Commenters also suggest that the statute's provision for federal district court review of state public utility commission decisions is inconsistent with the 11th Amendment. That issue is not properly before the Commission since it is the federal courts that will have to determine the scope of their jurisdiction and in any case "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987).

[231] *See Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993); *Allnet Comm. Servs. v. National Exchange Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992); *see also* TCC Comments at 61.

however, that federal court review is not the exclusive remedy regarding state determinations under section 252. The 1996 Act is clear when it intends for a remedy to be exclusive. For example, section 252(e)(6) provides that, if a state commission fails to act, as described in section 252(e)(5), "the proceeding by the Commission under [section 252(e)(5)] and any judicial review of the Commission's actions *shall be the exclusive remedies* for a State commission's failure to act."[232] In contrast, the succeeding sentence in section 252(e)(6) provides that any party aggrieved by a state commission determination under section 252 "*may* bring an action in an appropriate Federal district court . . . ."[233]

125. The Commission also stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory ruling where necessary to remove uncertainty or eliminate a controversy.[234] Because section 251 is critical to the development of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.

126. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law -- which includes the section 208 complaint process -- "unless expressly so provided."[235] Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

127. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

128. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether

[232] 47 U.S.C. § 252(e)(6) (emphasis added).

[233] *Id.* (emphasis added).

[234] *See* 47 C.F.R. § 1.2 (the Commission, in accordance with section 5(d) of the Administrative Procedures Act, 5. U.S.C. § 554(e), may issue a declaratory ruling terminating a controversy or removing uncertainty).

[235] 47 U.S.C. § 601(c)(1).

the common carrier's actions or omissions were in contravention of the Communications Act.[236] Thus, consistent with our past decisions in analogous contexts,[237] we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages.[238] We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.[239]

129. Finally, we clarify, as one commenter requested,[240] that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law. In addition, in appropriate circumstances, the Commission could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violators with radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a).

F. Regulations of BOC Statements of Generally Available Terms

130. We noted in the NPRM that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions,[241] as well as

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[236] While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint.

[237] *See Number Portability Order*, *supra*; *Freemon v. AT&T*, 9 FCC Rcd 4032, 4033 (1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to "bring a civil action in United States district court or any other court of competent jurisdiction" did not bar a complaint under section 208 of the Communications Act); *see also Policies Governing the Provision of Shared Telecommunications Service*, 3 FCC Rcd 6931 (1988) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest).

[238] *See* 47 U.S.C. § 207.

[239] *Town of Deerfield v. FCC*, 992 F.2d 420, 428-430 (2d Cir. 1993).

[240] *See* MCI comments at 9.

[241] *See* 47 U.S.C. §§ 252(f) and 271(c)(2)(B).

arrangements reached through compulsory arbitration pursuant to section 252(b).[242] We tentatively concluded that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply.

131. Only a few commenters addressed this issue, and most concurred with the tentative conclusion that we should apply the same requirements to both arbitrated agreements and BOC statements of generally available terms.[243] The Illinois Commission, for example, asserts that, "[s]ince the generally available terms could be viewed as a baseline against which to craft arbitrated arrangements, it is reasonable to hold both arbitrated agreements and the BOC statements of generally available terms to the same standards."[244] CompTel asserts that, particularly if states require incumbent LECs to tariff the terms and conditions in agreements that are subject to arbitration, there will be few if any distinctions between arbitrated agreements and generally available terms and conditions.[245]

132. We hereby find that our tentative conclusion that we should apply a single set of standards to both arbitrated agreements and BOC statements of generally available terms is consistent with both the text and purpose of the 1996 Act. BOC statements of generally available terms are relevant where a BOC seeks to provide in-region interLATA service, and the BOC has not negotiated or arbitrated an agreement. Therefore, such statements are to some extent a substitute for an agreement for interconnection, services, or access to unbundled elements. We also find no basis in the statute for establishing different requirements for arbitrated agreements and BOC statements of generally available terms. Moreover, a single set of requirements will substantially ease the burdens of state commissions and the FCC in reviewing agreements and statements of generally available terms pursuant to sections 252 and 271.

G. States' Role in Fostering Local Competition Under Sections 251 and 252

133. As already referenced, states will play a critical role in promoting local competition, including by taking a key role in the negotiation and arbitration process. We believe the negotiation/arbitration process pursuant to section 252 is likely to proceed as follows. Initially, the requesting carrier and incumbent LEC will seek to negotiate mutually agreeable rates, terms, and conditions governing the competing carrier's interconnection to the incumbent's network, access to the

[242] NPRM at para. 36 (*citing* 47 U.S.C. §§ 252(b), (f)).

[243] ACTA comments at 4; Arch comments at 5; BellSouth comments at 7; CompTel comments at 105; Illinois Commission comments at 14; MCI comments at 7; Sprint comments at 8.

[244] Illinois Commission comments at 14.

[245] Comptel comments at 105.

incumbent's unbundled network elements, or the provision of services at wholesale rates for resale by the requesting carrier. Either party may ask the relevant state commission to mediate specific issues to facilitate an agreement during the negotiation process.

134. Because the new entrant's objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent's market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement. In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

135. Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions by which the competing carrier receives access to the incumbent's loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state commission will establish the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.

136. State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications

carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).

137. The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.

III. DUTY TO NEGOTIATE IN GOOD FAITH

A. Background

138. Section 251(c)(1) of the statute imposes on incumbent LECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described" in sections 251(b) and(c), and further provides that "(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."[246] In the NPRM, we asked parties to comment on the extent to which the Commission should establish national rules defining the requirements of the good faith negotiation obligation.

B. Advantages and Disadvantages of National Rules

1. Comments

139. Some potential new entrants and other parties assert that clear national guidelines will prevent incumbent LECs from abusing their bargaining power for the purpose of undermining efforts to eliminate barriers to competition.[247] Some parties also assert that, in the absence of specific rules, negotiations between potential competitors are likely to be needlessly prolonged and contentious.[248] SBA claims that delay and other anticompetitive tactics are particularly burdensome on small businesses.[249] In addition, Independent Cable & Telecommunications Ass'n expresses concern that states might establish guidelines that favor the incumbent.[250] Other parties agree that national rules defining some limited aspects of good faith can simplify both negotiations and dispute resolution, but nevertheless contend that the Commission should not establish extensive or detailed rules in this area, because the facts and tactics of various negotiations will display only a few characteristics in common.[251]

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[246] 47 U.S.C. § 251(c)(1).

[247] *See, e.g.*, AT&T comments at 86-88; CEDRA comments at 1-9; TCC comments at 7-13.

[248] *See, e.g.*, ACSI comments at 7-11; AT&T comments at 86-88; Centennial Cellular Corp. comments at 2-10; Cox comments at 43-46; NCTA comments at 59-63.

[249] SBA comments at 8.

[250] Ind. Cable & Telecomm. Ass'n reply at 7.

[251] *See, e.g.*, Georgia Commission comments at 6; Pennsylvania Commission comments at 19-20; SBA comments at 9; Sprint comments at 10-11; Attorneys General reply at 12-13.

140. Some incumbent LECs and other parties contend that the FCC need not establish any rules regarding good faith negotiation, because the statute builds in a remedy of arbitration for parties that are dissatisfied with the negotiation process.[252] They maintain that national rules are inappropriate because a determination of whether a party has acted in good faith requires examination of specific facts that will not describe a pattern across the country.[253] SBC contends that national standards are inflexible, and thus will slow down the negotiation process, and that national rules are unnecessary, because the 1996 Act provides incentives for incumbents to negotiate.[254] Some parties also claim that section 252(b)(5) sets forth standards for good faith negotiation, and that provision makes no mention of a role for the FCC.[255]

2. Discussion

141. We conclude that establishing some national standards regarding the duty to negotiate in good faith could help to reduce areas of dispute and expedite fair and successful negotiations, and thereby realize Congress's goal of enabling swift market entry by new competitors. In order to address the balance of the incentives between the bargaining parties, however, we believe that we should set forth some minimum requirements of good faith negotiation that will guide parties and state commissions. As discussed above, the requirements in section 251 obligate incumbent LECs to provide interconnection to competitors that seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. Generally, the new entrant has little to offer the incumbent. Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement. In addition, incumbent LECs argue that requesting carriers may have incentives to make unreasonable demands or otherwise fail to act in good faith.[256] The fact that an incumbent LEC has superior bargaining power does not itself demonstrate a lack of good faith, or ensure that a new entrant will act in good faith.

142. We agree with commenters that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. As discussed more

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[252] BellSouth comments at 10-11; Texas Commission comments at 6-8; USTA comments at 8; *see also* District of Columbia Commission comments at 14-17.

[253] *See, e.g.*, Bell Atlantic comments at 47 (*citing Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, Notice of Proposed Rulemaking, FCC 96-196 (rel. Apr. 30. 1996)); Citizens Utilities comments at 6; Illinois Commission comments at 20-21; Ohio Commission comments at 21.

[254] SBC comments at 12-15.

[255] Citizens Utilities comments at 6; SBC comments at 7, 20.

[256] *See e.g.*, Bell Atlantic comments at 49; U S West comments at 40-42.

fully below, determining whether or not a party's conduct is consistent with its statutory duty will depend largely on the specific facts of individual negotiations. Therefore, we believe that it is appropriate to identify factors or practices that may be evidence of failure to negotiate in good faith, but that will need to be considered in light of all relevant circumstances.

143. Consistent with our discussion in Section II, above, we believe that the Commission has authority to review complaints alleging violations of good faith negotiation pursuant to section 208.[257] Penalties may be imposed under sections 501, 502 and 503 for failure to negotiate in good faith. In addition, we believe that state commissions have authority, under section 252(b)(5), to consider allegations that a party has failed to negotiate in good faith. We also reserve the right to amend these rules in the future as we obtain more information regarding negotiations under section 252.

C. Specific Practices that May Constitute a Failure to Negotiate in Good Faith

1. Comments

144. The comments included numerous suggestions regarding what might constitute a violation of the duty to negotiate in good faith. Commenters disagree about whether requiring another party to sign a nondisclosure agreement constitutes failure to negotiate in good faith. Some parties urge the Commission to prohibit nondisclosure agreements altogether,[258] but other parties assert that there may be legitimate reasons to seek nondisclosure.[259] Some parties assert that the Commission should only prohibit overly broad or restrictive nondisclosure agreements, such as agreements that cover information that is not commercially sensitive, or that require withholding information from regulatory agencies.[260] Some potential competitors also propose that incumbents should not be permitted to refuse to negotiate until a requesting carrier signs a nondisclosure agreement.[261]

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[257] We previously have held that parties may raise allegations regarding good faith negotiation pursuant to section 208. *Cellular Interconnection Proceeding*, 4 FCC Rcd 2369, 2371 (1989). The Commission also held in that case that "the conduct of good faith negotiations is not jurisdictionally severable." *Id.* at 2371.

[258] *See, e.g.*, LCI comments at 24; SBA comments at 9; TCI comments at 24.

[259] *See, e.g.*, Bell Atlantic comments at 48-49; GVNW comments at 3-4; Illinois Commission comments at 21; Sprint comments at 11-12; USTA comments at 8 n.11; U S West comments at 39-40.

[260] *See, e.g.*, GST comments at 5; MFS comments at 10-14; TCC comments at 9 (very broad nondisclosure agreements puts the incumbent in a powerful position, because it has information about numerous companies and the competitor does not have access to that same information); Teleport comments at 5-10; Texas Commission comments at 6-8.

[261] *See, e.g.*, ACTA comments at 6-7; Arch comments at 9-10; ITIC comments at 7-8; NCTA comments at 59-63; Teleport comments at 5-10; *accord* Washington Commission comments at 12.

145. Commenters assert that other practices constitute a violation of the duty to negotiate in good faith. For example, most commenters on this issue agree that demands that a party limit its legal rights or remedies signal a lack of good faith.[262] Many new entrants also assert that actions that have the purpose or effect of delaying or impeding negotiations constitute failure to negotiate in good faith. For example, GST asserts parties should be required to respond within a reasonable time to a request to begin negotiations.[263] Some parties also claim that failing to respond to a proposal or participate meaningfully and with the intention of reaching agreement demonstrates a lack of good faith.[264] For instance, Time Warner contends that a party may not simply present proposals that do not include critical terms, or that it knows are unacceptable.[265] Parties also maintain that establishing preconditions, such as requiring requesting carriers to complete unnecessary forms before beginning negotiations, should be prohibited.[266]

146. New entrants argue that the failure of an incumbent LEC to provide information necessary to conduct meaningful negotiations constitutes a refusal to negotiate in good faith.[267] Incumbent LECs similarly assert that requesting carriers should be required to provide certain information necessary to respond to their requests. For example, U S West states that an incumbent should be able to require a carrier that seeks interconnection to disclose what it wants to obtain, where, when, and for what duration.[268] U S West contends that a requesting carrier should not be permitted to demand immediate unbundling or interconnection, thereby forcing the incumbent to incur costs, while refusing to provide a proposed purchase and deployment schedule. Some incumbent LECs advocate a

[262] *See, e.g.*, ACTA comments at 6-7; Illinois Commission comments at 21; SBA comments at 9; Sprint comments at 11; TCI comments at 24; Washington Commission comments at 12.

[263] GST comments at 5;*accord* ACSI comments at 7-11; Bell Atlantic comments at 49 (refusing to schedule negotiations after making a request demonstrates bad faith); MFS comments at 10-14; Time Warner comments at 22-23.

[264] MFS comments at 10-14; Time Warner comments at 22-23.

[265] Time Warner comments at 22.

[266] ALTS comments at 12; AT&T comments at 86-88; Cox comments at 45-46; Excel comments at 8-9; Intelcom comments at 3-13; ITIC comments at 7-8; MFS comments at 10-14; LCI comments at 23; NCTA comments at 59-60; Time Warner comments at 22; Washington Commission comments at 12; NTIA reply at 6 n.14.

[267] *See, e.g.*, ACSI comments at 7-11; AT&T comments at 86-88; Cox comments at 45-46; GST comments at 6-7; MFS comments at 10-14 (for example, incumbent LECs must provide detailed documentation to support claims that a request to unbundle an element is technically infeasible); TCC comments at 9 (incumbent LECs must provide cost studies that underlie proposed rates); Time Warner comments at 22.

[268] U S West comments at 40-42.

"bona fide request" requirement for all interconnection requests.[269] Under such a requirement, a requesting carrier would have to: (1) certify that it will make use of the services or facilities it requests within a specified period from the date of the request; (2) describe the purpose of the request; (3) specify precisely what it was requesting; and (4) agree to purchase the requested services or facilities for a minimum time. Other parties specifically object to a "bona fide request" requirement. For example, LCI states that such a requirement would force a carrier to agree to purchase services or facilities before prices and other terms and conditions have been established.[270]

147. Other practices to which some commenters object include a refusal to negotiate any proposed term or condition, or conditioning negotiation on one issue upon first reaching agreement on another issue.[271] Time Warner contends, for example, that parties should not be permitted to require agreement on non-price terms before beginning to negotiate prices.[272] Time Warner also contends that it is a failure to negotiate in good faith to link negotiations under section 252 with negotiations between parties in another context. Some parties contend that it demonstrates a lack of good faith for a party to fail to appoint a representative in negotiations that has authority to bind the party it represents,[273] or at least authority to enter into tentative agreements on behalf of such party,[274] and that such failure needlessly delays negotiations. SCBA asserts that delays caused by failing to appoint an appropriate representative are particularly burdensome on small cable operators, which lack the resources to endure protracted negotiations and arbitrations.[275]

2. Discussion

148. The Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct of the transaction concerned."[276] When looking at good faith, the question "is a narrow one focused on

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[269] *See, e.g.*, Cincinnati Bell comments at 8-9; GTE comments at 15-17; PacTel comments at 16-21; TDS comments at 5-6; Anchorage Tel. Utility reply at 6-7.

[270] LCI comments at 24;*accord* GCI reply at 3.

[271] ALTS comments at 12; AT&T comments at 86-88; BellSouth comments at 10-11; Time Warner comments at 22.

[272] Time Warner comments at 26.

[273] AT&T comments at 86-88; CEDRA comments at 8.

[274] MFS comments at 10-14.

[275] SCBA comments at 10;*accord* Excel comments at 8-9; SBA comments at 8; Frontier reply at 6.

U.C.C. § 1-201(19) (1981);*see also* Black's Law Dictionary at 353 (Abridged ed. 1983) ("Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage .

the subjective intent with which the person in question has acted."[277] Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply.[278] For example, parties may not use duress or misrepresentation in negotiations.[279] Thus, the duty to negotiate in good faith, at a minimum, prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made. We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement.

149. Because section 252 permits parties to seek mediation "at any point in the negotiation,"[280] and also allows parties to seek arbitration as early as 135 days after an incumbent LEC receives a request for negotiation under section 252,[281] we conclude that Congress specifically contemplated that one or more of the parties may fail to negotiate in good faith, and created at least one remedy in the arbitration process.[282] The possibility of arbitration itself will facilitate good faith negotiation. For example, parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information -- given that section 252(b)(4)(B) authorizes the state commission to require the parties "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues."[283] That provision also states that, if either party "fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived."[284] The likelihood that an arbitrator will review the positions taken by the parties during negotiations also should discourage parties from refusing unreasonably to provide relevant information to each other or to delay negotiations.

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[277] U.C.C. § 1-201 (84).

[278] Steven J. Burton and Eric G. Anderson, *Contractual Good Faith*, § 8.2.2 at 332 (1995).

[279] *Id.*, § 8.3.1 at 335-341.

[280] 47 U.S.C. § 252(a)(2).

[281] 47 U.S.C. § 252(b)(1).

[282] Section 252(b)(4)(C) requires state commissions to "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." 47 U.S.C. § 252(b)(4)(C).

[283] 47 U.S.C. § 252(b)(4)(B).

[284] *Id.*

150. We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations.[285] In light of these considerations, we set forth some minimum standards that will offer parties guidance in determining whether they are acting in good faith, but leave specific determinations of whether a party has acted in good faith to be decided by a state commission, court, or the FCC on a case-by-case basis.

151. We find that there may be pro-competitive reasons for parties to enter into nondisclosure agreements. A broad range of commenters, including IXCs, state commissions, and incumbent LECs, support this view. We conclude that there can be nondisclosure agreements that would not constitute a violation of the good faith negotiation duty, but we caution that overly broad, restrictive, or coercive nondisclosure requirements may well have anticompetitive effects. We therefore will not prejudge whether a party has demonstrated a failure to negotiate in good faith by requesting another party to sign a nondisclosure agreement, or by failing to sign a nondisclosure agreement; such demands by incumbents, however, are of concern and any complaint alleging such tactics should be evaluated carefully. Agreements may not, however, preclude a party from providing information requested by the FCC, a state commission, or in support of a request for arbitration under section 252(b)(2)(B).

152. We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights. For example, we agree with ALTS' contention that an incumbent LEC may not demand that the requesting carrier attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,[286] because such a demand would be at odds with the provisions of sections 251 and 252 that are intended to foster opportunities for competition on a level playing field. In addition, we find that it is a *per se* failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future.

153. We decline to find that other practices identified by parties constitute *per se* violations of the duty to negotiate in good faith. Time Warner contends that we should find that a party is not

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[285] This is consistent with earlier Commission decisions. *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, First Report and Order, FCC 96-196 at para. 20 (rel. Apr. 30, 1996).

[286] ALTS comments at Attachment A, 15.

negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. Time Warner, however, did not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive.[287]

154. We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith.[288] The Commission will not condone any actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals. We agree with SCBA that small entities seeking to enter the market may be particularly disadvantaged by delay. However, whether a party has failed to negotiate in good faith by employing unreasonable delaying tactics must be determined on a specific, case-by-case basis. For example, a party may not refuse to negotiate with a requesting telecommunications carrier, and a party may not condition negotiation on a carrier first obtaining state certification.[289] A determination based upon the intent of a party, however, is not susceptible to a standardized rule. If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith.[290] In particular, we believe that designating a representative authorized to make binding representations on behalf of a party will assist small entities and small incumbent LECs by centralizing communications and thereby facilitating the negotiation

[287] For example, an incumbent LEC that offers video programming may be negotiating for the right to use video programming owned by a cable company while the cable company is negotiating terms for interconnecting with the incumbent LEC. Addressing some or all of the issues in the two negotiations collectively could expand the options for reaching agreement, and would equalize the parties' bargaining power, because each has something that the other party desires.

[288] *See United States v. American Tel. and Tel. Co.*, 524 F. Supp. 1336, 1356 and n.84 (D.D.C. 1981); *see also National Labor Relations Board v. Katz*, 369 U.S. 736, 742 (1962); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989).

[289] *See, e.g.*, ALTS comments at 12-13 (contending that U S West has refused to start negotiations until it formed its positions regarding section 251, and that SBC has attempted to interpret and "enforce" state certification requirements).

[290] The Commission has reached a consistent conclusion in other instances. *See, e.g., Application of Gross Telecasting, Inc.*, 92 FCC 2d 250, 442 (1981); *Public Notice*, FCC Asks for Comments Regarding the Establishment of and Advisory Committee to Negotiate Proposed Regulations, 7 FCC Rcd 2370, 2372 (1992).

process.[291] On the other hand, it is unreasonable to expect an agent to have authority to bind the principal on every issue -- i.e., a person may reasonably be an agent of limited authority.

155. We agree with incumbent LECs and new entrants that contend that the parties should be required to provide information necessary to reach agreement.[292] Parties should provide information that will speed the provisioning process, and incumbent LECs must prove to the state commission, or in some instances the Commission or a court, that delay is not a motive in their conduct. Review of such requests, however, must be made on a case-by-case basis to determine whether the information requested is reasonable and necessary to resolving the issues at stake. It would be reasonable, for example, for a requesting carrier to seek and obtain cost data relevant to the negotiation, or information about the incumbent's network that is necessary to make a determination about which network elements to request to serve a particular customer.[293] It would not appear to be reasonable, however, for a carrier to demand proprietary information about the incumbent's network that is not necessary for such interconnection.[294] We conclude that an incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because we conclude that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable. We find that this is consistent with Congress's intention for parties to use the voluntary negotiation process, if possible, to reach agreements. On the other hand, the refusal of a new entrant to provide data about its own costs does not appear on its face to be unreasonable, because the negotiations are not about unbundling or leasing the new entrants' networks.

156. We also find that incumbent LECs may not require requesting carriers to satisfy a "bona fide request" process as part of their duty to negotiate in good faith. Some of the information that

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[291] For purposes of our analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the Small Business Administration as "small business concerns."

[292] *See National Labor Relations Board v. Truitt Mfg Co.*, 351 U.S. 149, 153 (1956) (the trier of fact can reasonably conclude that a party lacks good faith if it raises assertions about inability to pay without making the slightest effort to substantiate that claim); *see also Microwave Facilities Operating in 1850-1990 MHz (2GHz) Band*, 61 F.R. 29679, 29689 (1996).

[293] *See* discussion of technical feasibility, *infra*, Section IV. In addition, the Commission's federal advisory committee, the Network Reliability Council, has developed templates that summarize and list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification. As consensus recommendations from the Council, we presume the elements defined in the templates are "good faith" issues for negotiation. Comments of the Secretariat of the Second Network Reliability Council at 4-5 (*citing Network Reliability: The Path Forward* (1996), Section 2, pp. 51-56).

[294] This is consistent with previous FCC determinations. *See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989) (good faith negotiations necessitate that, at a minimum, one party must approach the other with a specific request).

incumbent LECs propose to include in a bona fide request requirement may be legitimately demanded from the requesting carrier; some of the proposed requirements, on the other hand, exceed the scope of what is necessary for the parties to reach agreement, and imposing such requirements may discourage new entry. For example, parties advocate that a "bona fide request" requirement should require requesting carriers to commit to purchase services or facilities for a specified period of time. We believe that forcing carriers to make such a commitment before critical terms, such as price, have been resolved is likely to impede new entry. Moreover, we note that section 251(c) does not impose any bona fide request requirement. In contrast, section 251(f)(1) provides that a rural telephone company is exempt from the requirements of 251(c) until, among other things, it receives a "bona fide request" for interconnection, services, or network elements. This suggests that, if Congress had intended to impose a "bona fide request" requirement on requesting carriers as part of their duty to negotiate in good faith, Congress would have made that requirement explicit.

D. Applicability of Section 252 to Preexisting Agreements

1. Background

157. Section 252(a)(1) provides that, "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 . . . . The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section."[295]

158. In the NPRM, we sought comment on whether sections 252(a)(1) and 252(e) require parties that have negotiated agreements for interconnection, services or network elements prior to the passage of the 1996 Act to submit such agreements to state commissions for approval. We also asked whether one party to such an existing agreement could compel renegotiation and arbitration in accordance with the procedures set forth in section 252.

2. Comments

159. In general, potential local competitors that addressed this issue argue that the plain language of section 251(a)(1) requires such agreements to be filed with the appropriate state

[295] 47 U.S.C. § 252(a)(1). Section 252(e) provides that "(a)ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e).

commission for review under section 252(e).[296] In addition, these parties assert that, pursuant to section 252(i), the terms of such agreements must be made available to other carriers.[297] These parties claim that filing such agreements also should be required as a matter of public policy, because they provide evidence of existing interconnection terms that may provide the baseline for other negotiations,[298] and ensure that incumbents are not favoring some carriers over others.[299] Parties also claim that preexisting agreements will provide useful information to the states,[300] and that states should have the ability to review preexisting agreements to ensure that they comply with the 1996 Act.[301]

160. Incumbent LECs allege that the statute does not require that preexisting agreements be filed with state commissions. They contend that Congress only intended parties to file agreements negotiated pursuant to section 251.[302] These parties point out that section 252(a) specifically refers to requests for interconnection, services, or network elements "pursuant to section 251," and contend that an agreement reached prior to the enactment of the 1996 Act, by definition, could not have been negotiated pursuant to section 251.[303] Several parties suggest that the 1996 Act only requires filing of preexisting agreements that have been amended subsequent to the enactment of the 1996 Act, or that have been incorporated by reference into agreements negotiated pursuant to section 251.[304] Some commenters also contend that, as a policy matter, there is no reason to require filing of preexisting agreements. The California Commission asserts that requiring filing and review of preexisting

[296] *See, e.g.*, ALTS comments at 14-16; CompTel comments at 104; GST comments at 7; Jones Intercable comments at 22-23; Ohio Consumers' Counsel comments at 6; Sprint comments at 12; TCC comments at 9-10; *see also* Louisiana Commission comments at 8 (carriers must submit preexisting agreements upon request by the state commission).

[297] Section 252(i) provides that a LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

[298] AT&T comments at 88-90; Jones Intercable comments at 22-23.

[299] ALTS comments at 14-16, reply at 39-41.

[300] *See, e.g.*, AT&T comments at 88-90.

[301] *See, e.g.*, Arch comments at 9-10; Time Warner comments at 25.

[302] *See, e.g.*, BellSouth comments at 10-11; Cincinnati Bell comments at 9-10; Home Tel. comments at 2; J. Staurulakis comments at 3; F. Williamson comments at 5.

[303] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11; NYNEX reply at 15-16 (section 251(i) also applies only to agreements approved under section 252).

[304] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11.

agreements would be burdensome for states, and is unnecessary, because many states already reviewed such agreements prior to the passage of the 1996 Act.[305]

161. A related question is whether there should be a distinction between preexisting interconnection agreements between competitors within the same service area and agreements between non-competing or neighboring LECs. Several parties contend that the 1996 Act does not exempt such agreements from the filing requirement.[306] They also claim that it may be difficult to monitor whether parties are competing, and that, in light of the 1996 Act, parties that did not compete in the past may do so in the future.[307] ACTA asserts that such agreements will provide the best information available on technically, economically and operationally feasible interconnection arrangements, because these agreements were reached in a noncompetitive context, where the incumbent was not striving to protect its market from competition, and therefore, as a public policy matter, they should be publicly filed.[308] ALTS states that Wisconsin and other states have already addressed this issue and reached the same conclusion.[309]

162. Incumbent LECs argue that Congress did not contemplate that agreements between non-competing LECs would be used as models for agreements between competitors,[310] and that such agreements bear no relation to competitive interconnection agreements.[311] Some parties argue that requiring preexisting agreements between noncompeting LECs would jeopardize universal service in many areas, especially where extended area service arrangements are in place.[312] NYNEX and the Rural Telephone Coalition contend that agreements between neighboring LECs fall within the provisions

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[305] California Commission comments at 33.

[306] *See, e.g.*, Colorado Commission comments at 50; MFS comments at 66; Michigan Commission Staff comments at 20; Ohio Consumers' Counsel comments at 34; Oregon Commission comments at 33; ALTS reply at 35; Cox reply at 38-39; WinStar reply at 18-19.

[307] *See, e.g.*, MFS comments at 67; Oregon Commission comments at 34; ALTS reply at 36; Cox reply at 39.

[308] ACTA comments at 6-8; *accord* Cox reply at 38; WinStar reply at 19.

[309] ALTS reply at 35-36. *See, e.g.*, *Investigation of the Implementation of the Federal Telecommunications Act of 1996 in Wisconsin*, 05-TI-140 (Wisconsin Commission May 17, 1996); *In re Negotiated Interconnection Agreements of Telecommunications Carriers*, Docket No. 96-098-U (Arkansas Commission rel. Apr. 1, 1996).

[310] *See, e.g.*, NYNEX comments at 27 (*citing* Joint Explanatory Statement at 117, 120; Cong. Rec. S7893 (daily ed. June 7, 1995) (statement of Sen. Pressler)); Rural Tel. Coalition comments at 16; SBC comments at 53; USTA comments at 68-69.

[311] Cincinnati Bell comments at 9-10; MECA comments at 20-21; Texas Statewide Telephone Cooperative, Inc. reply at 8-9; U S West reply at 29-30.

[312] Home Tel. comments at 2; J. Staurulakis comments at 3; *see also* USTA comments at 69.

of section 259, which give rural LECs that lack economies of scope or scale the right to obtain or continue "infrastructure sharing" with neighboring larger LECs.[313]

163. Several parties recommend that agreements reached before enactment of the 1996 Act should be subject to a period of renegotiation.[314] For example, Sprint contends that the passage of the 1996 Act constitutes a "changed circumstance" that would justify renegotiation of preexisting agreements.[315] Sprint proposes that parties should be required to file preexisting agreements with the state commission, but that parties should be given a six-month period to renegotiate before the terms of such agreements are made available to others under section 252(i). Intermedia Communications advocates that parties that signed long-term contracts with incumbent LECs before additional rights and competitive alternatives were available under the 1996 Act should be permitted to terminate those agreements, with minimal liability, for a period of six months after such competitive alternatives become available.[316] GST advocates that only non-incumbent LECs that are parties to an agreement should have the right to renegotiate contracts.[317] The Texas Commission states that parties should be permitted to renegotiate in the event that the state determines that the preexisting agreement violates section 252.[318]

164. Some parties contend that there is no basis for renegotiation of preexisting contracts.[319] The Illinois Commission maintains that parties have a legal obligation to abide by the terms of their contracts, and the 1996 Act does not affect that obligation.[320] It claims that a unilateral right to abrogate existing contracts could undo progress that has already been made to foster local competition. The Illinois Commerce Commission notes that parties may mutually agree to amend existing contracts,

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[313] NYNEX reply at 15; Rural Tel. Coalition reply at 12.

[314] Intermedia comments at 16; LCI comments at 24-26; Sprint comments at 12-13, reply at 13-14.

[315] Sprint comments at 12 (pre-Act agreements were entered into under a different regulatory scheme, and without contemplation by the parties that the local market might become competitive; in addition, such contracts might be inconsistent with section 251, and states should not expend resources reviewing them); *accord* Time Warner comments at 26 (the Commission should establish "fresh look" period as it has done in other cases involving changed circumstances).

[316] Intermedia comments at 16; *accord* LCI comments at 24-26.

[317] GST comments at 7.

[318] Texas Commission comments at 7-8.

[319] *See, e.g.*, Illinois Commission comments at 23-24; Louisiana Commission comments at 8; F. Williamson comments at 5.

[320] Illinois Commission comments at 23-24.

and that a party that already has an agreement with an incumbent may request a new agreement under section 252(i) if the interconnection, services, or access to unbundled elements it seeks are different from those encompassed in the existing agreement. Pacific Telesis asserts that requiring renegotiation and arbitration of existing agreements would waste resources and interfere with parties' settled expectations.[321]

3. Discussion

165. We conclude that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the state commission for approval pursuant to section 252(e).[322] The 1996 Act does not exempt certain categories of agreements from this requirement. When Congress sought to exclude preexisting contracts from provisions of the new law, it did so expressly. For example, section 276(b)(3) provides that "nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996."[323] Nothing in the legislative history leads us to a contrary conclusion. Congress intended, in enacting sections 251 and 252, to create opportunities for local telephone competition. We believe that this pro-competitive goal is best effected by subjecting all agreements to state commission review.

166. The first sentence in section 252(a)(1) refers to requests for interconnection "pursuant to section 251."[324] The final sentence in section 252(a)(1) requires submission to the state commission of all negotiated agreements, including those negotiated *before* the enactment of the 1996 Act. Some parties have asserted that there is a tension between those two sentences. We conclude that the final sentence of section 252(a)(1), which requires that *any* interconnection agreement must be submitted to the state commission, can and should be read to be independent of the prior sentences in section 252(a)(1). The interpretation suggested by some commenters that preexisting contracts need only be filed if they are amended subsequent to the 1996 Act, or incorporated by reference into agreements negotiated pursuant to the 1996 Act, would force us to impose conditions that were not intended by Congress.

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[321] PacTel comments at 21.

[322] 47 U.S.C. § 252(a).

[323] 47 U.S.C. § 276(b)(3) (addressing nondiscrimination safeguards and regulations regarding payphone service).

[324] 47 U.S.C. § 252(a)(1).

167. As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).[325] In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.[326]

168. Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete. In addition, if we exempt agreements between neighboring non-competing LECs, those parties might have a disincentive to compete with each other in the future, in order to preserve the terms of their preexisting agreements. Such a result runs counter to the goal of the 1996 Act to encourage local service competition. Moreover, preserving such "non-competing" agreements could effectively insulate those parties from competition by new entrants. For example, if a new entrant seeking to provide competitive local service in a rural community is unable to obtain from a neighboring BOC interconnection or transport and termination on terms that are as favorable as those the BOC offers to the incumbent LEC in the rural area, the new entrant cannot effectively compete.[327] This is because the new entrant will have to charge its subscribers higher rates than the incumbent LEC charges to place calls to subscribers of the neighboring BOC.

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[325] *See infra*, Section XV.B.

[326] *See, e.g.*, 47 U.S.C. §§ 251(c)(2)(B) and 251(c)(3).

[327] This analysis does not address the separate question of whether an incumbent LEC in a rural area must offer interconnection, resale services, or unbundled network elements. As discussed *infra*, Section XII, Congress provided rural carriers with an exemption from section 251(c) requirements until the state commission removes such exemption. 47 U.S.C. § 251(f)(1).

169. We find that section 259 does not compel us to reach a different conclusion regarding the application of section 252 to agreements between neighboring LECs.[328] Section 259 is limited to agreements for infrastructure sharing between incumbent LECs and telecommunications carriers that lack "economies of scale or scope," as determined in accordance with regulations prescribed by the Commission.[329] We conclude that the purpose and scope of section 259 differ significantly from the purpose and scope of section 251.[330] Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act. Moreover, section 259(b)(7) requires LECs to file with the Commission or the state "any tariffs, contracts or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section."[331] We believe that this language further supports our conclusion that Congress intended agreements between neighboring LECs to be filed and available for public inspection. Commenters also have failed to persuade us that universal service is jeopardized by our finding that agreements between neighboring LECs are subject to section 252 filing and review provisions. Concerns regarding universal service should be addressed by the Federal-State Joint Board, empaneled pursuant to section 254 of the 1996 Act.[332] The Joint Board has initiated a comprehensive review of universal service issues and is considering, among other matters, access to telecommunications and information services in rural and high cost areas.[333] In addition, as discussed in Section XII, *infra*, the 1996 Act provides for exemptions, suspension, or modification of some of the requirements in section 251 for rural or smaller carriers.

170. Some parties have suggested that we provide parties an opportunity to renegotiate preexisting contracts. Parties, of course, may mutually agree to renegotiate agreements, but we decline to mandate that parties renegotiate existing contracts. In addition, as discussed below, commercial

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[328] Section 259 requires the Commission to prescribe, within one year after the date of enactment of the 1996 Act, regulations that require incumbent LECs "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier to provide telecommunications services, or to provide access to information services . . . " 47 U.S.C. § 259(a). A "qualifying carrier" is a telecommunications carrier that "lacks economies of scale or scope," and that offers telephone exchange service, exchange access, and any other service included in universal service to all consumers in the service area without preference. 47 U.S.C. § 259(d).

[329] 47 U.S.C. § 259(d)(1).

[330] The Commission plans to initiate a proceeding to establish regulations pursuant to section 259.

[331] 47 U.S.C. § 259(b)(7).

[332] *Universal Service NPRM*, *supra.*

[333] *See* 47 U.S.C. § 251(f).

mobile radio service (CMRS) providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option of renegotiating such agreements with no termination liabilities or contract penalties.[334] We believe that generally requiring renegotiation of preexisting contracts is unnecessary, however, because state commissions will review preexisting agreements, and may reject any negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement," or that "is not consistent with the public interest, convenience, and necessity."[335] We recognize that preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act. For example, non-competing neighboring LECs may have negotiated terms that simply are not viable in a competitive market. It would not foster efficient long-term competition to force parties to make available to all requesting carriers interconnection on terms not sustainable in a competitive environment. In such circumstances, a state commission would have authority to reject a preexisting agreement as inconsistent with the public interest. If a state commission approves a preexisting agreement, that agreement will be available to other parties in accordance with section 252(i). Contrary to NYNEX's assertion, once a state approves an agreement under section 252(e), that agreement is "approved under" section 252.

171. We decline to require immediate filing of pre-existing agreements. States should establish procedures and reasonable time frames for requiring filing of preexisting agreements in a timely manner. We leave these procedures largely in the hands of the states in order to ensure that we do not impair some states' ability to carry out their other duties under the 1996 Act, especially if a large number of such agreements must be filed and approved by the state commission. We believe, nevertheless, that we should set an outer time period to file with the appropriate state commission agreements that Class A carriers have with other Class A carriers that pre-date the 1996 Act.[336] We conclude that setting such a time limit will ensure that third parties are not prevented indefinitely from reviewing and taking advantage of the terms of preexisting agreements. We are concerned, however, about the burden that a national filing deadline might impose on small telephone companies that have preexisting agreements with Class A carriers or with other small carriers.[337] We therefore limit the filing deadline requirement to preexisting agreements between Class A carriers. We encourage all carriers to file preexisting contracts with the appropriate state commission no later than June 30, 1997, but impose this as a *requirement* only with respect to agreements between Class A carriers. We find that requiring

[334] *See infra*, Section XI.A.

[335] 47 U.S.C. § 252(e)(2)(A).

[336] Class A companies are defined as companies "having annual revenues from regulated telecommunications operations of $100,000,000 or more." 47 C.F.R. § 32.11(a)(1).

[337] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*.

preexisting agreements between Class A carriers to be filed no later than June 30, 1997 is unlikely to burden state commissions unduly, and will give parties a reasonable opportunity to renegotiate agreements if they so choose, while at the same time, establishing this outer time limit ensures that third parties will have access to the terms of such agreements, under section 252(i), within a reasonable period. We expect to have completed proceedings on universal service and access charges by this filing deadline. States may impose a shorter time period for filing preexisting agreements.

IV. INTERCONNECTION

172. This section of the Report and Order, and the three sections that follow it, address the interconnection and unbundling obligations that the Act imposes on incumbent LECs. Beyond the resale of incumbent LEC services, it is these obligations that pave the way for the introduction of facilities-based competition with incumbent LECs. The interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic. The unbundling obligation of section 251(c)(3) further permits new entrants, where economically efficient, to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete. Finally, both the interconnection and unbundling sections of the Act, in combination with the collocation obligation imposed on incumbents by section 251(c)(6), allow competing carriers to choose technically feasible methods of achieving interconnection or access to unbundled elements.

173. Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[338] Such interconnection must be: (1) provided by the incumbent LEC at "any technically feasible point within [its] network;"[339] (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection;"[340] and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[341]

A. Relationship Between Interconnection and Transport and Termination

1. Background

174. In the NPRM, we sought comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under section 251(c)(2) and the obligation of all LECs to establish reciprocal compensation arrangements for the "transport and termination" of

[338] 47 U.S.C. § 251(c)(2)(A).

[339] 47 U.S.C. § 251(c)(2)(B).

[340] 47 U.S.C. § 251(c)(2)(C).

[341] 47 U.S.C. § 251(c)(2)(D).

telecommunications pursuant to section 251(b)(5). We stated that the term "interconnection" might refer only to the physical linking of two networks or to both the linking of facilities and the transport and termination of traffic. We noted in the NPRM that section 252(d) sets forth different pricing standards for interconnection and transport and termination.

2. Comments

175. The BOCs, several state commissions, and other parties argue that a plain reading of section 251(c)(2) requires a determination that interconnection refers only to the physical linking of facilities.[342] In contrast, the IXCs and several other parties claim that interconnection includes both the physical connection of the facilities and the transmission and termination of traffic across that link.[343] CompTel contends that it would make no sense for Congress to require an incumbent LEC to engage in a physical linking with another network without requiring the incumbent LEC to route and terminate traffic from the other network.[344] Several parties claim that there is no inherent contradiction between the pricing standard in section 252(d)(1) for interconnection[345] and section 252(d)(2) for transport and termination[346] because, to the extent that section 252(d)(2) allows for the mutual and reciprocal recovery of each carrier's costs, the recovery could be interpreted to mean total service long run

[342] *See, e.g.*, Bell Atlantic comments at 20-21; BellSouth comments at 15; USTA comments at 9-10 (no useful purpose served by introducing ambiguity into the pricing standards that apply to the separate provisions); U S West comments at 11-12; GTE comments at 17-18 (interconnection denotes links between an incumbent LEC's network and a competitor's network while transport and termination refers to the transmission of a call from the point of interconnection to the called party); Florida Commission comments at 13; Illinois Commission comments at 29; New York Commission comments at 31; MFS comments at 15; Sprint comments at 13.

[343] *See, e.g.*, CompTel comments at 66-67; LDDS comments at 76; Texas Commission comments at 10; ACSI comments at 11.

[344] CompTel comments at 66-67.

[345] Section 252(d)(1) states that determinations by a state commission of the just and reasonable rate for interconnection pursuant to section 251(c)(2) and network elements pursuant to section 251(c)(3) shall be: (1) based on the cost determined without reference to a rate-of-return proceeding; (2) nondiscriminatory; and (3) may include a reasonable profit. 47 U.S.C. § 252(d)(1).

[346] Section 252(d)(2) states that, in connection with an incumbent LEC's compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless: (1) the terms and conditions provide for mutual and reciprocal recovery of costs associated with the transport and termination of calls that originate on the network of another carrier; and, (2) such terms and conditions are a reasonable approximation of the additional costs of terminating such calls. Section 252(d)(2) explicitly states that bill-and-keep arrangements are not precluded under section 252(d)(2) and neither the Commission nor the states are authorized to establish rate regulation proceedings to establish the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls. 47 U.S.C. § 252(d)(2).

incremental cost (TSLRIC) (including a reasonable profit) plus a reasonable contribution to joint and common costs, which is consistent with section 252(d)(1).[347]

3. Discussion

176. We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Including the transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under section 251(b)(5).[348] In addition, in setting the pricing standard for section 251(c)(2) interconnection, section 252(d)(1) states it applies when state commissions make determinations "of the just and reasonable rate for interconnection of *facilities and equipment* for purposes of subsection (c)(2) of section 251."[349] Because section 251(d)(1) states that it only applies to the interconnection of "facilities and equipment," if we were to interpret section 251(c)(2) to refer to transport and termination of traffic as well as the physical linking of equipment and facilities, it would still be necessary to find a pricing standard for the transport and termination of traffic apart from section 252(d)(1). We also reject CompTel's argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic. That duty applies to all LECs and is clearly expressed in section 251(b)(5). We note that because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, access charges are not affected by our rules implementing section 251(c)(2).

B. National Interconnection Rules

1. Background

177. In the NPRM, we tentatively concluded that national interconnection rules would facilitate swift entry by competitors in multiple states by eliminating the need to comply with a multiplicity of state variations in technical and procedural requirements.[350] We sought comment on this tentative conclusion.

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[347] ACSI comments at 11; Texas Public Utility Counsel comments at 1, 50; Texas Commission comments at 10.

[348] 47 U.S.C. § 251(b)(5).

[349] 47 U.S.C. § 251(d)(1) (emphasis added).

[350] NPRM at paras. 50-51.

2. Comments

178. Parties raise many of the same arguments discussed above, in section II.A., regarding the advantages and disadvantages of explicit national rules for interconnection. IXCs, CAPs, cable operators, and others claim that national rules could prevent incumbent LECs from erecting artificial barriers to entry,[351] facilitate comprehensive business and network planning,[352] equalize bargaining power,[353] and expedite and simplify negotiations.[354] Other parties, including several BOCs and state commissions, argue that national rules should only be established for core requirements and should allow for state variations.[355] Some parties contend, for example, that the pace of technological change makes it impossible to create immutable and uniform interconnection rules.[356] SBC and PacTel claim that industry standards already exist for interconnection and that national standards would preclude the deployment of new technologies.[357] PacTel also claims that Commission rules requiring untested interconnection methodologies may slow competitive entry.[358]

3. Discussion

179. As discussed more fully above, we conclude that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market.[359] Uniform rules will permit all carriers, including small entities and small incumbent LECs, to plan regional or national

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[351] *See* MFS comments at 14; Teleport comments at 22; CompTel comments at 21; Ad Hoc Telecommunications Users Committee comments at 5; ACTA comments at 10; ACSI comments at 10; MCI reply at 24.

[352] *See* ACTA comments at 10; Vanguard comments at 10; Omnipoint comments at 17-18; NTIA reply at 3.

[353] *See* Teleport comments at 17; Kansas Commission comments at 5; AT&T reply at 9; MCI reply at 24; Time Warner reply at 6-7.

[354] *See* Intermedia comments at 3; Teleport reply at 8.

[355] *See, e.g.*, Ameritech comments at 11; BellSouth comments at 13-14; Bell Atlantic reply at 6-7; GTE reply at 9; Lincoln Tel. comments at 3; California Commission comments at 16; Illinois Commission comments at 25; New York Commission comments at 33; Texas Commission comments at 8; TCA comments at 4; Texas Tel. Ass'n comments at 1; F. Williamson comments at 7.

[356] *See* Ad Hoc Telecommunications Users Committee comments at 2; Citizens Utilities comments at 6-7; Rural Tel. Coalition comments at 31; Pennsylvania Commission reply at 23.

[357] SBC comments at 33; PacTel comments at 24, 28.

[358] PacTel comments at 23-24.

[359] *See supra*, Section II.A.

networks using the same interconnection points in similar networks nationwide. Uniform rules will also guarantee consistent, minimum nondiscrimination safeguards and "equal in quality" standards in every state. Such rules will also avoid relitigating, in multiple states, the issue of whether interconnection at a particular point is technically feasible.

180. We believe, however, that inflexible or overly detailed national rules implementing section 251(c)(2) may inhibit the ability of the states or the parties to reach arrangements that reflect technological and market advances and regional differences. We also believe that, on several issues, the record is not adequate at this time to justify the establishment of national rules. Therefore, as required by section 251(d)(3) and as discussed in section II.C. above, our rules will permit states to go beyond the national rules discussed below, and impose additional procompetitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the Commission's regulations. We believe that we can benefit from state experience in our ongoing review of these issues.

C. Interconnection for the Transmission and Routing of Telephone Exchange Service and Exchange Access

1. Background

181. Section 251(c)(2) imposes a duty upon incumbent LECs to provide "interconnection with the [LEC's] network . . . for the transmission and routing of telephone exchange service and exchange access."[360] In the NPRM, we sought comment on whether a carrier could request interconnection pursuant to subsection (c)(2) for purposes of transmitting and routing telephone exchange service, exchange access, or both, or whether this provision requires that such a request be solely for purposes of providing *both* telephone exchange service and exchange access.[361]

2. Comments

182. The BOCs and several other parties state that a telecommunications carrier should not be able to request cost-based interconnection under section 251(c)(2) solely for the purpose of offering access services. They argue that a carrier requesting interconnection solely under section 251(c)(2) must use that interconnection for the transmission and routing of both telephone exchange service *and*

[360] 47 U.S.C. § 251(c)(2).

[361] NPRM at para. 162.

exchange access.[362] USTA concurs, and suggests that competitive access providers (CAPs) will not be harmed because, if CAPs wish to provide only exchange access, they are fully protected by the Commission's *Expanded Interconnection* rules.[363]

183. IXCs and the DOJ argue that carriers should be able to request cost-based interconnection under section 251(c)(2) solely for the purpose of offering access services. The IXCs claim that, in view of congressional intent not to limit entry into the local telecommunications market, the statute should be read to permit telecommunications carriers to provide either local exchange service, exchange access, or both.[364] DOJ and CompTel contend that permitting the use of section 251(c)(2) interconnection to provide competitive exchange access is not inconsistent with section 251(g)[365] because section 251(g) only preserves the rights of IXCs to equal access under the Commission's preexisting rules until such time that the Commission adopts new requirements. They argue that section 251(g) was not intended to limit the provision of exchange access by new entrants.[366] AT&T argues that, by requiring incumbent LECs to provide interconnection for the transmission and routing of telephone exchange access, Congress used the word "and" to make clear that incumbent LECs must make interconnection available for purposes of allowing new entrants to provide local exchange *and* exchange access, and thereby prevent incumbent LECs from claiming that, as long as they offered interconnection for at least one of these two purposes, they had met the requirement in section 251(c)(2).[367]

3. Discussion

[362] *See, e.g.*, USTA comments at 62-64 (requiring both is in keeping with the Act's purpose of encouraging facilities-based competition); Ameritech comments at 17-19 (nothing in the Act or the legislative history indicates that Congress was concerned about exchange access service per se); Bell Atlantic comments at 8; BellSouth comments at 61; GTE comments at 75; Ohio Consumers' Counsel comments at 32.

[363] USTA comments at 65.

[364] *See, e.g.*, CompTel reply at 26, 33; AT&T reply at 24 n.40; Sprint comments at 68 n.38; DoJ comments at 44, 52; PageNet comments at 15-16 (the word "and" in the context of legislative history can be read alternatively as "and" or "or", depending on congressional intent).

[365] Section 251(g) states that each LEC "shall provide exchange access, information access, and exchange services for such access to [IXCs] and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" that apply prior to enactment of the 1996 Act. Section 251(g) also states that these rules shall remain in effect until the Commission "explicitly supersede[s]" them. 47 U.S.C. § 251(g).

[366] DoJ comments at 53 n.26; CompTel reply at 28.

[367] AT&T reply at 24 n.40.

184. We conclude that the phrase "telephone exchange service and exchange access" imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both. We believe that this interpretation is consistent with both the language of the statute and Congress's intent to foster entry by competitive providers into the local exchange market.[368] Moreover, the term "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service *or* exchange access."[369] Thus, we believe that Congress intended to facilitate entry by carriers offering either service. In imposing an interconnection requirement under section 251(c)(2) to facilitate such entry, however, we believe that Congress did not want to deter entry by entities that seek to offer either service, or both, and, as a result, section 251(c)(2) requires incumbent LECs to interconnect with carriers providing "telephone exchange service *and* exchange access."[370] Congress made clear that incumbent LECs must provide interconnection to carriers that seek to offer telephone exchange service *and* to carriers that seek to offer exchange access. This interpretation is consistent with section 251(c)(2), which imposes an obligation on incumbent LECs, but not requesting carriers.[371] Thus, for example, an analogous requirement might be that incumbent LECs must provide interconnection for the transmission and routing of "electrical and optical signals." Such a hypothetical requirement could not rationally be read to obligate *requesting carriers* to provide both electrical and optical signals.[372]

185. We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the incumbent LEC's network under subsection (c)(2) would unduly restrict potential competitors. For example, CAPs often enter the telecommunications market as exchange access providers prior to offering telephone exchange services. Further, applying separate regulatory regimes (*i.e.*, section 251 related-rules for providers of telephone exchange and exchange access services and section 201 related-rules for providers of only exchange access services) with divergent requirements to parties using essentially the same equipment

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[368] As the U.S. Court of Appeals for the Fifth Circuit stated in *Peacock v. Lubbock Compress Company*, "the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." The court held that "[i]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'." *Peacock v. Lubbock Compress Company*, 252 F.2d 892, 893 (5th Cir. 1958) (*citing United States v. Fisk*, 70 U.S. 445, 448).

[369] 47 U.S.C. § 153(26) (emphasis added).

[370] 47 U.S.C. § 251(c)(2) (emphasis added).

[371] Where Congress intended to impose obligations on requesting carriers in section 251(c), it did so expressly. For example, section 251(c)(1) includes a specific and separate requirement on requesting carriers to negotiate in good faith. 47 U.S.C. § 251(c)(1).

[372] One definition of the word "and" is "as well as." Random House College Dictionary 50 (rev. ed. 1984). Under this definition, the provision can be read, and we believe should be read, to require LECs to provide interconnection for the transmission and routing of telephone exchange service as well as exchange access.

to transmit and route traffic, is undesirable in light of the new procompetitive paradigm created by section 251.[373] We see no convincing justification for treating providers of exchange access services that offer telephone exchange services differently from access providers who do not offer telephone exchange services. We therefore conclude that parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).

D. Interexchange Service is Not Telephone Exchange Service or Exchange Access

1. Background

186. Sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs to provide interconnection and nondiscriminatory access to unbundled network elements to "any requesting telecommunications carrier."[374] In the NPRM, we tentatively concluded that carriers providing interexchange services are "telecommunications carriers" and thus may seek interconnection and unbundled elements under subsections (c)(2) and (c)(3). We also tentatively concluded, however, that with respect to section 251(c)(2), the statute imposes limits on the purposes for which any telecommunications carrier, including IXCs, may request interconnection pursuant to that section. Section 251(c)(2) imposes an obligation upon incumbent LECs to provide requesting carriers with interconnection if the purpose of the interconnection is for the "transmission and routing of telephone exchange service and exchange access."[375] We tentatively concluded in the NPRM that interexchange service does not appear to constitute either "telephone exchange service" or "exchange access." "Exchange access" is defined in section 3(16) as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[376] We stated that an IXC that requests interconnection to originate or terminate an interexchange toll call is not "offering" access services, but rather is "receiving" access services.

2. Comments

187. DOJ and the Illinois Commission agree with the Commission's tentative conclusion that IXCs may obtain interconnection pursuant to 251(c)(2) to provide exchange service and exchange

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[373] *See infra*, Section VI.B.2.a. for a discussion of the relationship between *Expanded Interconnection* tariffs and section 251. Competitive access providers use the same equipment in essentially the same manner as other providers of both telephone exchange and exchange access services.

[374] 47 U.S.C. §§ 251(c)(2) and (c)(3).

[375] 47 U.S.C. § 251(c)(2)(A).

[376] 47 U.S.C. § 153(16).

access.[377] DOJ states that this would permit IXCs to participate fully in the provision of local exchange and exchange access services.[378]

188. Many parties, including several incumbent LECs and DOJ, agree with the Commission's tentative conclusion in the NPRM that carriers are not permitted to receive interconnection pursuant to 251(c)(2) solely for the purpose of originating or terminating interexchange traffic.[379] Several parties contend that, although IXCs are telecommunications carriers under the 1996 Act, they provide neither "exchange service" nor "exchange access" when they offer only long distance service to their customers.[380] Some commenters assert that an IXC requesting interconnection to originate or terminate a toll call would be receiving access services, not offering them, and thus would not fall within the definition of exchange access.[381] Parties also claim that permitting interconnection for this purpose would conflict with the plain meaning of sections 251(i)[382] and (g).[383] USTA argues that section 251(g) requires LECs to continue to provide exchange access service to IXCs under the Commission's existing rules. USTA claims that if Congress had intended to change the access charge regime within the timeframe for implementing section 251, it would not have granted the Joint Board, created under

[377] DoJ comments at 42-43; Illinois Commission comments at 48-49.

[378] DoJ comments at 42-43.

[379] *See, e.g.*, BellSouth comments at 60-61; NYNEX comments at 5; GTE comments at 75; DoJ comments at 42; California Commission comments at 34; Bell Atlantic reply at 4-5; PacTel reply at 36; Rural Tel. Coalition reply at 8; NYNEX reply at 7 (it is not a question of the type of party that is applying for interconnection but rather the purpose for which the interconnection is being sought).

[380] DoJ comments at 42; USTA reply at 5; BellSouth reply at 45. NYNEX argues that, although some parties contend that section 251(c)(2)(A) refers to the services that the incumbent LEC provides rather than the services the requesting carrier seeks, this is contrary to the most natural reading of the language of the statute and is inconsistent with the legislative history, which makes clear that the section was intended to apply to interconnection between LECs. NYNEX reply at 7-8.

[381] *See, e.g.*, DoJ comments at 42; USTA reply at 5; BellSouth reply at 45; PacTel reply at 36; Sprint reply at 33; Rural Tel. Coalition reply at 8.

[382] *See, e.g.*, USTA comments at 61; Bell Atlantic comments at 9; NYNEX comments at 12-13; NYNEX reply at 9-10; Rural Tel. Coalition reply at 9.

[383] *See, e.g.*, USTA comments at 61; NYNEX comments at 13; Bell Atlantic comments at 9; GTE comments at 75; Citizens Utilities comments at 22; Rural Tel. Coalition reply at 10. GTE argues that if, as some parties claim, section 251(g) preserves the Commission's access charge regime only until the Commission adopts new rules under section 251(d), this renders section 251(g) unnecessary because the need to preserve those rules does not arise until the new section 251(d) rules are implemented. GTE reply at 39. Also, GTE claims that interpreting section 251(g) as maintaining only the existing equal access and nondiscrimination requirements of the MFJ, GTE Decree, and the Commission's rules overlooks the fact that section 251(g) explicitly preserves rules regarding "receipt of compensation" for such access*Id.*

section 254, nine months to make recommendations to the Commission.[384] Several parties also argue that the legislative history supports the conclusion that section 251 was not designed to permit IXCs to avoid application of our current access charge rules.[385] Other carriers claim that permitting interconnection pursuant to section 251(c)(2) to allow parties avoid access charges would be unwise from a policy perspective, because it would divest the Commission of jurisdiction over the rates for interstate exchange access services,[386] and would preempt state pricing regulations that were the result of years of consideration.[387]

189. IXCs and others argue that section 251(c)(2) permits carriers to obtain interconnection solely for the purpose of originating and terminating interexchange traffic.[388] CompTel claims that IXCs satisfy the "offering" requirement when they offer and provide exchange access as an integral part of long distance service to the end-user subscribers.[389] Cable and Wireless claims that section 251(i) merely preserves the Commission's authority under section 201(a), which requires carriers to establish physical connection with each other in compliance with the Commission's rules.[390] ALTS argues that any erosion of access revenues that might occur as a result of the IXCs' migration to section 251 interconnection arrangements would not occur so rapidly as to affect incumbent LECs materially before the Commission completes its reform of the universal service subsidy flows.[391] CompTel suggests an

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[384] USTA comments at 61.

[385] *See, e.g.*, NECA comments at 4-5; PacTel reply at 36; Rural Tel. Coalition reply at 9-10 (the Joint Explanatory Statement (p. 123) evinces Congress's intent to preserve the Commission's access charge regime and authority over interstate access).

[386] Ameritech comments at 21; Bell Atlantic comments at 10; NYNEX comments at 78; PacTel reply at 36; Rural Tel. Coalition reply at 8.

[387] NYNEX comments at 19; NECA comments at 2-4.

[388] *See, e.g.*, AT&T reply at 23; MCI reply at 20-22; CompTel reply at 25-26; American Petroleum Institute comments at 3-13; ALTS comments at 46; Cable & Wireless comments at 28; Citizens Utilities comments at 21; Excel comments at 3 (use restrictions will hinder competition).

[389] CompTel comments at 51-52. CompTel claims that by writing a broader "offering" requirement into the statute, the FCC would limit interconnection under section 251(c)(2) to LECs, and not "telecommunications carriers" as Congress intended. CompTel also claims that there is no feasible interpretation that would prevent IXCs, regardless of whether they "offer" exchange access, from obtaining stand-alone exchange access indirectly through co-carrier interconnection arrangements under section 251(c)(2). CompTel reply at 31-32.
Cable & Wireless claims that the canons of statutory construction preclude a reading of the Act that holds that Congress provided all telecommunications providers with the ability to purchase access to unbundled elements for telecommunications services, but forbade them from interconnecting to the network in order to utilize unbundled elements for all telecommunications services. Cable & Wireless comments at 29.

[390] Cable & Wireless comments at 31.

[391] ALTS comments at 46; Citizens Utilities comments at 21; MCI reply at 21 (the loss of access charge revenues for incumbent LECs due to the Act cannot be used to deny the full benefits of section 251 to IXCs).

interim plan that would permit incumbent LECs to charge non-cost-based rates for access until the Commission completes access charge reform, but would declare that until that time, incumbent LECs would be deemed not to have met the section 271 checklist for providing in-region interexchange service.[392] Excel claims that it would be unlawful under section 202(a) for an IXC to pay charges for local network connections that are substantially higher than the charges paid by other users of the same network services.[393] Finally, CompTel and MCI argue that the legislative history of section 251 supports the conclusion that IXCs are permitted to obtain interconnection pursuant to section 251.[394]

3. Discussion

190. We conclude that IXCs are telecommunications carriers[395] under the 1996 Act, because they provide telecommunications services[396] (*i.e.*, "offer telecommunications for a fee directly to the public") by originating or terminating interexchange traffic. IXCs are permitted under the statute to obtain interconnection pursuant to section 251(c)(2) for the "transmission and routing of telephone exchange service and exchange access."[397] Moreover, traditional IXCs are a significant potential new local competitor and we conclude that denying them the right to obtain section 251(c)(2) interconnection lacks any legal or policy justification. Thus, all carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (*i.e.*, non-interexchange calls).

191. We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its *interexchange* traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive

[392] CompTel comments at 81-87.

[393] Excel comments at 4-5.

[394] CompTel reply at 32 (although the Senate bill, S.652, expressly required requesting carriers to obtain interconnection for the purpose of providing exchange access service, Congress rewrote that provision in conference to remove the requirement that carriers obtain interconnection for the purpose of providing exchange access); MCI reply at 21 (arguments based on provisions in unenacted drafts of the Act excluding access from the local interconnection provisions are rebutted by the fact that both the House and Senate bills included provisions mandating cost-based access rates in other sections).

[395] 47 U.S.C. § 153(44).

[396] 47 U.S.C. § 153(46).

[397] 47 U.S.C. § 251(c)(2).

interconnection pursuant to section 251(c)(2).[398] Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the transmission and routing of telephone exchange service and exchange access."[399] A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only -- for the purpose of providing interstate services only -- fall within the scope of the phrase "exchange access." Such a would-be interconnector is not "offering" access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel's position that IXCs are offering exchange access when they offer and provide exchange access as a part of long distance service. We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if it does not offer exchange access services to others. As we stated above, however, providers of competitive access services are eligible to receive interconnection pursuant to section 251(c)(2). Thus, traditional IXCs that offer access services in competition with an incumbent LEC (*i.e.*, IXCs that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2). For example, when an IXC interconnects at a local switch, bypassing the incumbent LECs' transport network, that IXC may offer access to the local switch in competition with the incumbent. In such a situation, the interconnection point may be considered a section 251(c)(2) interconnection point.

[398] As stated above, interconnection pursuant to section 251(c)(2) is merely the physical linking of facilities between two networks, and thus access charges are not implicated by the Commission's decisions regarding whether parties who seek to interconnect solely for the purpose of originating or terminating interexchange traffic on the incumbent's network are entitled to obtain interconnection pursuant to section 251(c)(2). *See supra*, Section IV.A.

[399] Section 153(47) defines telephone exchange service as "(A) service within a telephone exchange, or within a connected system of [ ] exchanges within the same exchange area operated to furnish . . . intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities . . . ." 47 U.S.C. § 153(47). Section 153(16) states that exchange access means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

E. Definition of "Technically Feasible"

1. Background

192. In addition to specifying the purposes for which carriers may request interconnection, section 251(c)(2) obligates incumbent LECs to provide interconnection within their networks at any "technically feasible point."[400] Similarly, section 251(c)(3) obligates incumbent LECs to provide access to unbundled elements at any "technically feasible point." Thus our interpretation of the term "technically feasible" applies to both sections.

193. In the NPRM, we sought comment on a "dynamic" definition of "technically feasible" that would provide flexibility for negotiating parties and the states in determining interconnection and unbundling points as network technology evolves.[401] We requested comment on the extent to which network reliability concerns should be included in a technical feasibility analysis, and tentatively concluded that, if such concerns were involved, the incumbent LEC had the burden to support such a claim with detailed information.[402] We also sought comment on the role of other considerations, such as economic burden, in determining technical feasibility under sections 251(c)(2) and 251(c)(3).[403]

194. We also tentatively concluded that interconnection or access at a particular point in one LEC network evidences the technical feasibility of providing the same or similar interconnection or access in another, similarly structured LEC network.[404] Finally, we tentatively concluded that incumbent LECs have the burden of proving the technical infeasibility of providing interconnection or access at a particular point.[405]

2. Comments

195. Commenters offer a wide range of interpretations of the term "technically feasible." Many commenters urge the Commission to offer only broad guidelines with respect to technical feasibility and

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[400] 47 U.S.C. § 251(c)(2)(B).

[401] NPRM at paras. 56-59, 87-88.

[402] *Id.* at paras. 56, 88.

[403] *Id.* at paras. 56-59, 87-88.

[404] *Id.* at paras. 57, 87.

[405] *Id.* at paras. 58, 87.

allow the parties and the states to determine the details.[406] Most BOCs and other LECs argue that "technically feasible" does not mean technically possible or imaginable, and that other factors should be considered in determining what points are technically feasible.[407] Other factors offered by the commenters include cost, network reliability and security, space limitations, the existence of operations support systems, quality of service provided, interoperability, field trials, performance standards, industry standards, the need for construction of new facilities, and inherent fairness.[408] USTA, SBC, and others allege that previous Commission orders have considered economic issues in technical feasibility analyses.[409] GVNW argues that small LECs should not be required to unbundle if it is economically unreasonable.[410] The Rural Telephone Coalition contends that the Commission should recognize the differences between small and large operations, high-volume and low-volume local networks, and urban and rural carriers and networks.[411] USTA also suggests that the statute only requires incumbent LECs to provide interconnection to their networks as they are configured presently and that it does not require incumbent LECs to take risky or unreasonable steps to construct new facilities or reconfigure their networks in response to competitor requests.[412]

196. Many potential competitors argue that the definition of "technical feasibility" should be extremely broad and dynamic, to encompass the effects of future technical changes.[413] Sprint contends

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[406] *See, e.g.*, USTA comments at 11; Bell Atlantic comments at 15; U S West comments at 44; BellSouth reply at 18; California Commission comments at 19; Texas Commission comments at 11; Citizens Utilities comments at 8 (parties are in the best position to determine the technical requirements and abilities).

[407] *See, e.g.*, SBC comments at 25; BellSouth comments at 16; USTA comments at 11; U S West reply at 22.

[408] *See, e.g.*, NYNEX comments at 65-66; SBC reply at 17; Ameritech comments at 16; ALLTEL comments at 7-8; Roseville Tel. comments at 5-6; U S West reply at 22; Lincoln Tel. reply at 3; *see also* USTA comments at 10-12; Florida Commission comments at 13-14; DoD comments at 6 (network reliability must be considered in technical feasibility). GVNW believes that interconnection is technically feasible if: (1) the interconnection point is a normal LEC access point for provisioning of service to its customers; (2) the LEC maintains assignment records for the point; (3) LEC personnel access facilities at the point for interconnecting other LEC facilities; (4) cross-connecting the facility at the point does not expose the network to undue damage; and (5) the LEC and requesting carriers can demonstrate the technical proficiency of personnel assigned to work at the interconnect point. GVNW comments at 18-19.

[409] *See, e.g.*, USTA comments at 12 n.16; SBC comments at 16.

[410] GVNW comments at 21-22.

[411] Rural Tel. Coalition comments at 31.

[412] *See, e.g.*, USTA comments at 11; BellSouth comments at 16; SBC comments at 25; Lincoln Tel. reply at 3; Roseville Tel. comments at 5-6; Office of the Ohio Consumers' Counsel comments at 10; ALLTEL reply at 5-6.

[413] *See, e.g.*, MCI comments at 12-13; MFS comments at 15; Teleport comments at 25; Nortel comments at 7; Continental Cablevision comments at 20; NCTA comments at 32; Time Warner reply at 13 (all points should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof); Colorado Commission comments at 18; Michigan Commission comments at 8-9; Attorneys General of Connecticut et

that the Commission should use the plain meaning of the word "feasible" in defining technical feasibility. Sprint states that Webster's Dictionary defines "feasible" as "possible of realization" and any more restrictive reading would unduly restrict the availability of interconnection.[414] Many parties contend that incumbent LECs should have the burden of proving specific points are not technically feasible.[415] Time Warner claims that any point should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof.[416] AT&T argues that existing industry standards for interconnection at a point evidences the technical feasibility of interconnection at such a point.[417] MCI argues that technically feasible points of interconnection may be either physical, for facilities and equipment, or logical, for software and databases.[418] Several parties ask the Commission to make clear that technical feasibility does not require that operations support systems for order processing, provisioning and installation, billing, and other support functions be in place in order to make a specific interconnection point technically feasible.[419] Several competing carriers also contend that economic factors should not be considered in determining technically feasibile points of interconnection and access to unbundled elements. They argue that if incumbent LECs are not required to expend any funds or resources to provide for technically feasible interconnection or access, competing carriers will be limited to the services currently offered by the incumbents.[420]

197. Some parties propose specific definitions of technical feasibility. For example, Sprint defines "technically feasible" as "possible to accomplish without a scientific or technological

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al. reply at 4 n.2; Hyperion comments at 10; Independent Cable & Telcomm. Ass'n reply at 9.

[414] Sprint reply at 16; ACSI reply at 6.

[415] *See, e.g.*, MCI comments at 11; Continental Cablevision comments at 20; CompTel comments at 41; Sprint comments at 14; Cox comments at 42; AT&T reply at 11; DoJ comments at 19; California Commission comments at 19; Alabama Commission comments at 15; Ohio Commission comments at 25; Colorado Commission comments at 19.

[416] Time Warner reply at 13; MCI reply at 23 (incumbent LECs do not argue that interconnection points are not technically feasible but rather that the Commission reverse its tentative conclusion that the burden of proof falls on incumbent LECs to demonstrate technical infeasibility); Cable & Wireless comments at 13 (technical feasibility can be assessed by examining the type and quality of interconnection an incumbent LEC already provides to itself, its affiliates and co-carriers).

[417] AT&T comments at 33.

[418] MCI comments at 12; IDCMA reply at 6-7.

[419] *See, e.g.*, MCI comments at 12, Sprint reply at 16-17; AT&T reply at 10 (the need for additional investment to make an arrangement available should not result in a determination of technical infeasibility); Time Warner reply at 15, 17; ACTA comments at 10;

[420] *See, e.g.,* AT&T comments at 14-20; MCI reply at 23-29; Sprint reply at 16; Time Warner reply at 16.

breakthrough, *i.e.*, without an advance in the state of the art."[421] MFS defines the term as "any point in an [incumbent LEC's] network where suitable transmission, cross-connect or switching facilities are present to permit the routing of traffic to and from another network."[422]

3. Discussion

198. We conclude that the term "technically feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasibile.

199. We find that the 1996 Act bars consideration of costs in determining “technically feasible” points of interconnection or access. In the 1996 Act, Congress distinguished "technical" considerations from economic concerns. Section 251(f), for example, exempts certain rural LECs from "unduly economically burdensome" obligations imposed by section 251(c) even where satisfaction of such obligations is "technically feasible."[423] Similarly, section 254(h)(2)(A) treats "technically feasible" and "economically reasonable" as separate requirements.[424] Finally, we note that the House committee that considered H.R. 1555 (which was combined with Senate Bill S.652 to form the 1996 Act) dropped the term "economically reasonable" from its unbundling provision. The House committee explicitly addressed this substantive change, reporting that "this requirement could result in certain unbundled . . . elements . . . not being made available."[425] Thus, the deliberate and explained substantive omission of explicit economic requirements in sections 251(c)(2) and 251(c)(3) cannot be undone through an interpretation that such considerations are implicit in the term "technically feasible." Of course, a

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[421] Sprint reply at 15-16; Time Warner reply at 13 (any point of interconnection should be presumptively technically feasible).

[422] MFS comments at 15.

[423] 47 U.S.C. § 251(f)(1)(A).

[424] 47 U.S.C. § 254(h)(2)(A).

[425] H. Rep. 104-204, 71 (1995).

requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[426]

200. USTA and SBC cite the Commission's *900 Service* order[427] as support for the contention that costs must be considered in a technical feasibility analysis.[428] In that order, the Commission concluded that "[i]n defining 'technically feasible,' we balance both technical and economic considerations with a view toward providing [900] blocking capability to consumers without imposing undue economic burdens on LECs."[429] Our *900 Service* order, however, has little bearing on our interpretation of the term "technically feasible" in the 1996 Act. As stated above, the 1996 Act distinguishes technical considerations from the "undue economic burdens" considered in the *900 Service* order. Indeed, Congress used virtually the same language—"unduly economically burdensome"—in drawing the distinction.[430] If, as SBC contends, we are to presume that Congress was aware of the Commission's analysis of the technical feasibility of 900 call blocking,[431] the 1996 Act appears squarely to reject that view of technical feasibility. Moreover, unlike the costs of providing 900 call blocking, which we imposed largely on LECs in the *900 Service* order, as noted above, to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.

201. In addition to economic considerations, section 251(c)(6) distinguishes considerations of "space limitations" from those of "technical reasons," and thus, in general, we believe existing space or site restrictions should not be included within a technical feasibility analysis.[432] Of course, under section 251(c)(6) "space" restrictions are expressly considered along with "technical" considerations in determining whether an incumbent LEC must provide for physical collocation. Where physical collocation is not practical because of "space limitations," however, incumbent LECs must provide for

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[426] *See* 47 U.S.C. § 252(d)(1); *see also infra*, Section VII (concluding that requesting carriers must pay incumbent LECs the cost of interconnection or unbundling).

[427] *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166, 6174 (1991) *(900 Service)*.

[428] USTA comments at 12 n.16; SBC reply at 16.

[429] *900 Service* at 6174.

[430] *See* 47 U.S.C. § 251(f)(1)(A).

[431] SBC reply at 16 ("Presumably Congress was aware of this FCC definition of the term "technically feasible" when Congress chose to use it in the 1996 Act.").

[432] 47 U.S.C. § 251(c)(6).

virtual collocation.[433] Section 251 is silent as to whether an incumbent LEC's duty to provide for virtual collocation or other methods of interconnection or access to unbundled elements is dependent on space constraints. We conclude, as a practical matter, that space limitations at a particular network site, without any possibility of expansion, may render interconnection or access at that point infeasible, technically or otherwise. Where such expansion is possible, however, we conclude that, in light of the distinction drawn in section 251(c)(6), site restrictions do not represent a "technical" obstacle. Again, however, the requesting party would bear the cost of any necessary expansion. Nor do we believe the term "technical," when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3),[434] includes consideration of accounting or billing restrictions.

202. Several parties also attempt to draw a distinction between what is "feasible" under the terms of the statute, and what is "possible." The words "feasible" and "possible," however, are used synonymously. Feasible is defined as "capable of being accomplished or brought about; possible."[435] The statute itself provides a more meaningful distinction. Unlike the "technically *feasible*" terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term "*practical* for technical reasons" in determining the scope of an incumbent LEC's obligation to provide for physical collocation.[436] "Practical" is defined as "manifested in practice or action . . . not theoretical or ideal"[437] or "adapted or designed for actual use; useful," and connotes similarity to ordinary usage.[438] Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of

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[433] *Id.*

[434] *See* Random House College Dictionary at 1349 ("6. pertaining to or connected with the mechanical or industrial arts and the applied sciences").

[435] The American Heritage College Dictionary 499 (1993). Webster's Ninth New Collegiate Dictionary 453 (1989). Both "feasible" and "possible" refer to that which is "capable of being realized." *Id.* at 918.

[436] 47 U.S.C. § 251(c)(6) (emphasis added).

[437] Webster's at 923.

[438] Random House College Dictionary 1040 (rev. ed. 1984).

sections 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

203. We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. The reports of the Commission's Network Reliability Council discuss network reliability considerations, and establish templates that list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification.[439]

204. We further conclude that successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards. We also conclude that previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality. Although most parties agree with this conclusion, some LECs contend that such comparisons are all but impossible because of alleged variability in network technologies, even where the ultimate services offered by separate networks are the same. We believe that, if the facilities are substantially similar, the LECs' contention is adequately addressed.

205. Finally, because sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs, we conclude that incumbent LECs must prove to the appropriate state commission that interconnection or access at a point is not technically feasible. Incumbent LECs possess the information necessary to assess the technical feasibility of interconnecting to particular LEC facilities. Further, incumbent LECs

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[439] *Network Reliability: A Report to the Nation* (1993, National Engineering Consortium); *Network Reliability: The Path Forward* (1996, Internet: http://www.fcc.gov/oet/nrc).

have a duty to make available to requesting carriers general information indicating the location and technical characteristics of incumbent LEC network facilities. Without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects.

206. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, the Rural Telephone Coalition argues that the Commission should set interconnection points in a flexible manner to recognize the differences between carriers and regions. We do not adopt the Rural Telephone Coalition's position because we believe that, in general, the Act does not permit incumbent LECs to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible. We believe that this interpretation will advance the procompetitive goals of the statute. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

F. Technically Feasible Points of Interconnection

1. Background

207. In the NPRM, we requested comment on which points within an incumbent LEC's network constitute "technically feasible" points for purposes of section 251(c)(2).[440] Having defined the phrase "technically feasible" above, we now determine a minimum set of technically feasible points of interconnection.

2. Comments

208. Incumbent LECs claim that the specific points of interconnection should either be left to the negotiation process, or that the Commission should require interconnection only at core points, and leave all other points to the negotiation process.[441] For example, Ameritech claims that it is only technically feasible for competitors to interconnect at its end or tandem offices.[442] Bell Atlantic asserts that the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and the signal transfer points (STPs) are the only technically feasible points for interconnection.[443] Potential

[440] NPRM at paras. 56-59.

[441] *See, e.g.*, USTA comments at 10-11; BellSouth comments at 15-19; NYNEX comments at 65 (points of interconnection should be left to negotiation); Ameritech comments at 13-14; PacTel comments at 21-22; Oregon Commission comments at 25-26.

[442] Ameritech comments at 13-14; Ohio Commission comments at 24.

[443] Bell Atlantic comments at 20-21; Lincoln Tel. comments at 5.

competitors, on the other hand, argue that interconnection is technically feasible, and should be mandated by the Commission, at numerous points in the incumbent LEC's network.[444] AT&T, for example, argues that interconnection is technically feasible: (1) at the loop concentrator; (2) between the loop feeder element and the competitive provider's switch; (3) between the incumbent LEC's switch and the competitive provider's operator systems; (4) between a competitive provider's switch and a LEC's signaling A link; (5) between a competitive provider's signaling A link and an incumbent LEC's STP; (6) between a competitive provider's dedicated transport and an incumbent LEC's office; and, (7) between incumbent LEC and non-incumbent LEC STPs.[445] MFS argues that, regardless of the specific points listed by the Commission, states should be able to expand the list of technically feasible points.[446]

3. Discussion

209. We conclude that we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers. Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.[447]

210. We conclude that, at a minimum, incumbent LECs must provide interconnection at the line-side of a local switch (at, for example, the main distribution frame), the trunk-side of a local switch; the trunk interconnection points for a tandem switch; and central office cross-connect points in general. This requirement includes interconnection at those out-of-band signaling transfer points necessary to exchange traffic and access call related databases. All of these points of interconnection are used today

[444] ALTS comments at 18 (interconnection should be available at any technically feasible point regardless of the technical fabric of the network at the requested point); MCI comments at 12-13 (technically feasible points may be either physical, for facilities and equipment, or logical, for software and databases); Time Warner reply at 15 (interconnection should not be limited to "core requirements" because the statute mandates interconnection at any technically feasible point).

[445] Letter from Bruce Cox and Betsy Brady, AT&T, to Regina M. Keeney, Common Carrier Bureau, FCC, March 21, 1996, at 29-32 (AT&T March 21 Letter).

[446] MFS comments at 14.

[447] *See* Robert S. Pendyck and Daniel L. Rubinfeld, Microeconomics (2nd ed. 1992).

by competing carriers, noncompeting carriers, or LECs themselves for the exchange of traffic, and thus we conclude that interconnection at such points is technically feasible.

211. A varied group of commenters, including Bell Atlantic and AT&T, agree that interconnection at the line-side of the switch is technically feasible.[448] Interconnection at this point is currently provided to some commercial mobile radio service (CMRS) carriers[449] and may be necessary for other competitors that have their own distribution plant, but seek to interconnect to the incumbent's switch. We also agree with numerous commenters that claim that interconnection at the trunk-side of a switch is technically feasible and should be available upon request.[450] Interconnection at this point is currently used by competing carriers to exchange traffic with incumbent LECs. Interconnection to tandem switching facilities is also currently used by IXCs and competing access providers, and is thus technically feasible. Finally, central office cross-connect points, which are designed to facilitate interconnection, are natural points of technically feasible interconnection to, for example, interoffice transmission facilities. There may be rare circumstances where there are true technical barriers to interconnection at the line- or trunk-side of the switch or at central office cross-connect points, however, the parties have not presented us with any such circumstances. Thus, incumbent LECs must prove to the state commissions that such points are not technically feasible interconnection points.

212. We also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (*i.e.*, points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and thus we incorporate those points by reference here. Finally, as noted above, we have identified a minimum list of technically feasible interconnection points: (1) the line-side of a local switch; (2) the trunk-side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. In addition, we anticipate and encourage parties and the states, through negotiation and arbitration, to identify additional points of technically feasible interconnection. We believe that the experience of the parties and the states will benefit our ongoing review of interconnection.

G. Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection

[448] *See, e.g.*, Bell Atlantic comments at 20-21; NYNEX comments at 65; BellSouth reply at 23; AT&T March 21 Letter at 30.

[449] AT&T comments in CC Docket No. 95-185 at 6 n.6 (Mar. 4, 1996).

[450] *See, e.g.*, Bell Atlantic comments at 20-21; BellSouth reply at 23; NYNEX comments at 65; Lincoln Tel. comments at 5.

1. Background

213. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[451] In the NPRM, we sought comment on whether we should adopt national requirements governing the terms and conditions of providing interconnection. We also sought comment on how we should determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt national guidelines governing installation, service, maintenance, and repair of the incumbent LEC's portion of interconnection facilities.[452]

2. Comments

214. MCI argues that incumbent LECs should not be permitted to set restrictions on the type of traffic that can be combined on a single trunk group unless signaling requirements dictate the need for separate trunk groups. Rather, MCI argues that incumbent LECs should be required to accept one-way and two-way trunk groups.[453] MCI also urges the Commission to require incumbents and competitors to select one point of interconnection (POI) on the other carrier's network at which to exchange traffic. MCI further requests that this POI be the location where the costs and responsibilities of the transporting carrier ends and the terminating carrier begins.[454] NEXTLINK argues that incumbent LECs should only be permitted to require earnest fees of new entrants if such fees are required of other incumbent LEC customers.[455]

215. Many incumbent LECs, state commissions, and others oppose explicit national rules regarding standards for just, reasonable, and nondiscriminatory terms of interconnection and claim that

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[451] 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3).

[452] We discuss the rates for interconnection below in Section VII.

[453] MCI comments at 40-41.

[454] Under MCI's proposal, new entrants would be considered co-carriers with incumbent LECs, and each carrier that seeks to interconnect with an incumbent LEC would be required to designate, for each local calling area, at least one point of interconnection (POI) on the other carrier's network. A carrier could designate more than one POI but could not be required to do so. Interconnection would result in the termination of a competing carrier's traffic at at least the same level of service quality that the incumbent LEC provides for terminating its own traffic, without any additional charge to the competing carrier to obtain that level of service. MCI comments at 40-46.

[455] NEXTLINK comments at 19.

these issues are best resolved through negotiation and arbitration.[456] Several commenters urge the Commission to adopt a rule that only requires that terms and conditions for interconnection points be nondiscriminatory.[457] BellSouth argues that longstanding nondiscrimination reporting requirements have never revealed a problem in the area of installation, maintenance, and repair.[458] Bell Atlantic contends that all arrangements provided by the incumbent LEC for a competitor should be made reciprocal, because new business buildings or residential developments may have only facilities owned by a new entrant. Absent a reciprocity requirement, Bell Atlantic contends that incumbent LECs could be at a competitive disadvantage in competing for those customers. Bell Atlantic also argues that reciprocal interconnection will put a check on potentially unrealistic unbundling requests.[459]

3. Discussion

216. We conclude that minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection will be in the public interest and will provide guidance to the parties and the states in the arbitration process and thereafter. We believe that national standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations. Negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because new entrants are dependent solely on the incumbent for interconnection.

217. Section 202(a) of the Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in

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[456] *See, e.g.*, Ameritech comments at 16-17; BellSouth comments at 20; USTA comments at 18; GTE comments at 21; SNET comments at 14; Alabama Commission comments at 15; California Commission comments at 20; Oregon Commission comments at 26-27; GVNW comments at 15; MECA comments at 25; Ohio Consumers' Counsel comments at 12 (an effective complaint procedure should be adopted rather than overly specific guidelines). The Ohio Commission and PacTel state that performance standards governing installation, maintenance and repair are unnecessary. PacTel contends that states and industry fora such as the Ordering and Billing Forum (OBF) can establish the necessary rules without Commission intervention. PacTel comments at 29; Ohio Commission comments at 26.

[457] *See, e.g.*, Bell Atlantic comments at 31; BellSouth comments at 20-21; SBC comments at 37; GTE reply at 11; California Commission comments at 20; District of Columbia Commission comments at 18-19; Ohio Consumers' Counsel comments at 12.

[458] BellSouth comments at 20-21; *see also* Bell Atlantic comments at 31 (provisioning interconnection and unbundled elements for new entrants is complicated and requires more work than provisioning simple dial tone; the Commission should not mandate that LECs provide interconnection and unbundled elements using the appropriate installation, service, and maintenance intervals that apply to LEC customers and services); Rural Tel. Coalition comments at 32-33 (service intervals for small and rural LECs with respect to provision of interconnection should only be equal to those which the LEC achieves for itself).

[459] Bell Atlantic comments at 32.

connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person."[460] By comparison, section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[461] The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.

218. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the procompetitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D). Also, incumbent LECs may not discriminate against parties based upon the identity of the carrier (*i.e.*, whether the carrier is a CMRS provider, a CAP, or a competitive LEC). As long as a carrier meets the statutory requirements, as discussed in this section, it has a right to obtain interconnection with the incumbent LEC pursuant to section 251(c)(2).

219. We identify below specific terms and conditions for interconnection in discussing physical or virtual collocation (*i.e.*, two methods of interconnection).[462] We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.

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[460] 47 U.S.C. § 202(a).

[461] 47 U.S.C. § 251(c)(2)(D).

[462] *See infra,* Section VI.

220. Finally, as discussed below,[463] we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (*i.e.*, section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs). We do note, however, that 251(c)(1) imposes upon a requesting telecommunications carrier a duty to negotiate the terms and conditions of interconnection agreements in good faith. We also conclude that MCI's POI proposal, permitting interconnecting carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between parties.[464] We believe that the record on this issue is not sufficiently persuasive to justify Commission action at this time. As market conditions evolve, we will continue to review and revise our rules as necessary.

H. Interconnection that is Equal in Quality

1. Background

221. Section 251(c)(2)(C) requires that the interconnection provided by an incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[465] In the NPRM, we sought comment on how to determine whether interconnection is "equal in quality."

2. Comments

222. MFS claims that the incumbent LEC should provide to everyone the highest grade service it makes available to anyone, including neighboring non-competing LECs.[466] MFS also claims that traffic exchange facilities between incumbent LECs and competitors should be designed to meet at least the same technical criteria and grade of service standards (*e.g.*, probability of blocking in peak hours and transmission standards) as used by the incumbent for the inter-office trunks used in its

[463] *See infra*, Section XI.A.

[464] Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2).

[465] 47 U.S.C. § 251(c)(2)(C).

[466] MFS comments at 17 (even if higher grade service is offered to a non-competing LEC, the incumbent LEC must offer this service to competitors); Intermedia comments at 4.

network.[467] Other parties claim that any criteria established by the Commission should not be overly detailed and quantitative or microscopic.[468] The Pennsylvania Commission suggests that "equal in quality" should mean interconnection that is virtually identical to that received by the incumbent LEC itself or its affiliate with no noticeable differences between the two to the end-user.[469] Nortel claims that the definition of "equal in quality" should recognize differences across technologies.[470]

223. Some parties argue that no national standards for "equal in quality" are necessary, and that this determination is best left to a case-by-case determination.[471] GTE claims that it should be acceptable for states to define equal in quality in terms of perception by the end user.[472]

3. Discussion

224. We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (*e.g.*, the imposition of disparate conditions between carriers on the pricing and ordering of services).

225. We also note that section 251(c)(2) requires interconnection that is "at least" equal in quality to that enjoyed by the incumbent LEC itself. This is a minimum requirement. Moreover, to the

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[467] MFS comments at 17.

[468] *See, e.g.*, Ameritech comments at 17; Pennsylvania Commission comments at 21; Ohio Consumers' Counsel comments at 13.

[469] Pennsylvania Commission comments at 21.

[470] Nortel comments at 9.

[471] *See, e.g.*, BellSouth comments at 22; USTA comments at 18; GTE comments at 22; Citizens Utilities comments at 11; Alabama Commission comments at 16; Ohio Consumers' Counsel comments at 13 (dispute resolution process should ultimately decide the success or failure of quality-oriented requirements).

[472] GTE comments at 22.

extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We also conclude that, as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection,[473] competition will be promoted.[474]

[473] *See infra*, Section VII.

[474] *See also* Section VII.E. (discussion of accommodation of interconnection).